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CANONICAL PROCEDURE

IN

DISCIPLINARY AND CRIMINAL CASES OF CLERICS.

A Systematic Commentary on the "Instructio S. C. Epp. et Reg., 1880."

BY THE

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EDITOR'S PREFACE.

When in the year 1880 the S. Congregation of Bishops and Regulars sent to the Bishops of Italy the now famous Instruction on the summary procedure in disciplinary and criminal causes of clerics, it soon became evident that the reform thus initiated would not remain confined to Italy, but would gradually find its way to other countries. Anticipating this, the Rev. Francis Droste, a priest of the diocese of Paderborn, wrote a short and simple commentary on the new procedure, which he designed more for practical use than legal speculation. In order, however, that the laws themselves on which the several articles of the Instruction are based, may be sufficiently understood, the author gives in the first part a short exposition of ecclesiastical jurisdiction and its judicial organs, while in the Introduction he determines the place occupied by the Instruction in the public and historical law of the Church.

The Third Plenary Council of Baltimore in 1884, complying with the request of the S. C. de Prop. Fide, adopted the same Instruction[1] with a few slight modifications (which may be seen at a glance in the *Appendix*). It is a mere question of time when these same provisions shall be extended to all English-speaking missionary countries; and as an English commentary on the Instruction was desired, a German priest of the diocese of Covington, Ky., translated Father Droste's little book. To be of greater service, however, the work needed adaptation to conditions for which it was not originally intended. This labor was intrusted to the present writer, who confesses to having taken very great liberty with the translation as well as with the original work. Droste wrote for readers who had gone through a regular course of Canon law and were, moreover, acquainted with the practice of canonical pro-

[1] Where this American Instruction differs from the Italian, we refer to it by its initial words, *Cum Magnopere;* to the other by *L'Ordinario;* and where they agree, simply by *Instr.* 1880. To the Instr. S. C. de Prop. Fide on the Committee of Investigation (see *Appendix*) we refer by *Instr.* 1878. Finally to that on the Tridentine suspension (see *Appendix*) by *Instr.* 1884.

cedure. The editor hopes to reach a much larger class of readers. Hence explanatory notes have been added and a number of paragraphs of new matter inserted in the text (these being indicated by an asterisk, thus: 97*) to supply more of what he considers useful or even necessary information; again, for sections dealing with matters of only local interest, others of a more general bearing have been substituted (thus in pt. I. sec. 3), and subjects too lightly touched upon by the author have been more fully developed (as, e.g., that of judicial evidence). Besides, more system and perspicuity were to be obtained by placing what seemed logically allied subjects under one head, instead of leaving them, as originally, scattered in different places (thus were formed chap. 1, 3, in pt. II. sec. 1). In a word, the original has been so radically changed that the author will hardly recognize his German offspring in this "naturalized" American edition.

DROSTE did not consider it necessary to insert copies of judicial formulas or documents, since they can easily be found in *Bouix* and *Monacelli*.

With regard to legal phraseology the editor has tried to use English rather than Latin, notwithstanding his very imperfect knowledge of the former language. Not being a student of Common law he experienced great difficulty in finding the proper English equivalent for the Latin technical terms and phrases of which Canon law possesses such an abundance. Yet with an English legal vocabulary at hand it did not seem proper to retain the Latin terminology in a branch of Catholic science that must become ere long an essential part of theological learning in all English-speaking lands. The editor is fully sensible that he has not given a perfect rendering; still a beginning had to be made. *Vivat sequens.*

A word as to the references. The required series of the *Analecta* J. P. not being at hand, it was impossible to verify the references thereto made by the author. With the exception of these, however, and those to the *Corpus J. Can.* and the *Acta S. S.* (which were all verified), the rest are made by the editor to suit those readers who desire a fuller treatment of the subject or some authority for the opinion stated. Frequent reference

is made to the *Commentators*, that is to those canonists who have written regular commentaries to the Decretals of Gregory IX., the most important part of the *Corpus J. C.* and "the backbone of authentic Church legislation."[1] These commentaries follow exactly the order of the Decretals as to book, title, and chapter.[2] Yet other, especially Roman, writers on Canon law are not neglected. No apology is deemed necessary for referring more frequently to recent than to ancient canonists. Law and discipline must change even in God's Church. Other times demand other laws, and new conditions require new provisions. From the older commentators we may learn the spirit of Canon law, the principles and traditional norms to be observed in its application and execution; but the laws of our own time and the actual practice must be learned from modern teachers. In this connection the *Irish Ecclesiastical Record*, l. c., very appropriately remarks: "We need new books on Canon law for two reasons. In the first place each fresh effort helps to push forward the scientific treatment of ecclesiastical legislation beyond the old lines in one or more directions. Secondly, the law itself, by reason of its daily expansions, requires further explanation where additions have been made or changes introduced, in order that we may know what it really implies in our own times and surroundings."

This leads to another observation, here offered with due deference to learned *jurisperitis*.

The Instruction of 1880 appears like a new creation. It is not a mere furbishing up of old material or putting together of what had once been parts of various canonical processes. It is a new legislation in spirit, character, and form. Although the matter is gathered from older forms of trials, yet there is evidently a new substantial form to unite them into a new canonical procedure that has no like in all the former laws. Roman teachers have already admitted that although being called a summary and economical procedure, yet the old rules on summary trials cannot be applied to the new process without further discrimina-

[1] *Irish Eccl. Record*, 1886. vol. vii. p 658.

[2] *De Angelis* made an exception by reserving book II., on trials, for the last volume in connection with book V., on crime and punishment.

tion; that although following on the lines of the older inquisition, it is yet of an altogether different nature. Hence the lengthy, detailed, and subtile disquisitions of older writers on the various forms of canonical procedure and the rules which they establish cannot be simply transferred to the new form, although they may throw great light on the nature and purpose of its several provisions and tell us in what spirit they must be carried out. It is, therefore, quite probable that not only will writers differ in opinion, but also that those whom it concerns will differ in practice. Until Rome, however, shall have decided such doubtful points, as it is anticipated she will (*Instr.*, art. 44), it may be wise to remember that errors in the proceeding will not interfere with the course of law nor render a trial void as long as the *substantial rules of justice* are observed, and that as to this the law is in favor of the judge. A defendant or advocate who should, with Schmalzgruber on his right and Reiffenstuel on his left, enter a plea of nullity on the ground of irregular proceeding would probably discover too late that those learned counsellors referred to "another case."

The present Instruction applies not to mere administrative measures or civil matters, but only to criminal and disciplinary causes. Discipline[1] here means correction, castigation, and even punishment. This is evident from arts. 1, 2 of the Instruction, as well as from the answer of the S. C. de Prop. F., when it says that the Instruction of 1878 was meant for such cases "*in quibus ecclesiastica poena seu censura sit infligenda, aut gravi disciplinari coercitioni sit locus.*" Hence the interesting question arises: How are the bishops to proceed in purely civil cases, as for instance, of a congregation against the rector or *vice versa*, or of cleric against cleric, when the matter cannot be settled amicably between the parties? May they proceed on the lines of the present Instruction? If not, why not?

In conclusion, mindful of the leading title of this work, the editor is tempted to hope (with the permission of the publishers) that the book may never be needed, but may rather remain "on the shelf."

SETON HALL COLLEGE,
SOUTH ORANGE, N. J., May 1887.

[1] See *Du Cange*, Glossarium, s. v. Disciplina.

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CANONICAL PROCEDURE.

Introduction.

CHAPTER I.

OBJECT OF THE ECCLESIASTICAL LAW OF DISCIPLINARY AND CRIMINAL PROCEDURE.

1. The right to threaten with punishment certain actions of her members, the Catholic Church received from her Divine Founder at her very origin.[1] She cannot give up this right, for that were to give up her existence; to deny her this right were to deny her the right to exist. It is, rather, one of her most important duties to exercise this right to punish, and indeed history shows that she has ever, from her foundation to the present day, successfully administered it.

In the exercise, however, of this right of discipline and punishment the Church has not only to make disciplinary and penal laws to be observed by her members, but also actually to apply them in a given case. The latter takes place in disciplinary and criminal procedure, the end and object of which is, first, a judgment to determine whether a person by a determinate act has violated a penal law and what punishment he has thereby incurred; secondly, the infliction of the penalty. The penal precept is laid down by positive law, the violation thereof is determined by means of an inquiry, and the judgment or sentence is then the result of a logical inference, namely:

[1] Matt. xviii. 15–18.

Major: The clergyman who forges papal instruments shall be degraded. Minor: But the clergyman "N." has forged a papal instrument.

Conclusion: Therefore Rev. "N." shall be degraded.

Criminal law or jurisprudence may be said to comprise two distinct parts, namely, the law concerning the crimes themselves and their corresponding punishments (material Cr. L.[1]); and the law of determining the existence and nature of crime in a particular case and of applying the right penalty, or the Rules of Criminal Procedure (formal Cr. L.[1]).

2. Whether a person have actually committed a delict, and if so, what be its disciplinary or criminal nature,—in other words, what be the real matter of fact,—can only be determined by inquiry and information. But as to how this is to be done, and how the judge may be convinced of the commission of such crime by such person, nations have held different views at different times; indeed, in every single case those of the judge, accuser, and accused would almost always differ. Hence the very mode and manner of proceeding in a given case, in order to ascertain the criminal character of an act, to refer it to its class in the criminal law and to impose the penalty incurred: the *modus procedendi* itself must be regulated by law. The Catholic Church must, therefore, establish legal norms of disciplinary and criminal procedure, and in fact she has done so. It is the object of the science of ecclesiastical criminal procedure to establish scientifically, to combine organically, and further to develop the positive rules of procedure.

3. Ecclesiastical punishments are by custom divided into corrective and vindictive (simply or strictly called

[1] These terms are explained by the fact that the first part treats of the matter (*materia*) on which judgment is to be given, the other of the form (*forma*) of it.

punishments), according as the primary object is either the correction (*disciplina*) of the offender, or retribution and expiation of the offence.[1] According to this, we may distinguish between disciplinary and criminal proceedings. By most punishments, however, both objects may be attained,[2] and as in order to establish the matter of fact a more or less formal proceeding takes place in every case, the terms *disciplinary punishment* and strictly called *punishment* as well as *disciplinary* and *criminal procedure* are often exchanged; the more as the boundary line between them cannot be easily drawn in practice. Therefore in the following pages we use both terms indiscriminately where they are not logically opposite.

CHAPTER II.

RELATION BETWEEN THE CANON AND CIVIL LAW OF CRIMINAL PROCEDURE.

4. The rights[3] of the Church in the domain of criminal procedure, abstractly considered, are exactly coextensive with her material criminal law. Besides the Church, the State also exercises criminal jurisdiction over its subjects, many of whom, if not all, are at the same time members of the Catholic Church.

[1] There is yet another end of punishment, namely, the preservation of public order and the protection of society and its members. This end, however, may be said to be attained partly by the reform of the offender, partly by upholding the sanctity of the law, the moral sense of the public, and love of order by the expiation of the crime.

[2] *Rota*, p. 549 remarks: "Certum est quod ecclesia quam caritas materna exercet duo tantum habet proposita in poenis infligendis; primum ut peccator ad bonam frugem redeat, alterum ut ceteri exemplo poenae a crimine deterreantur. Non enim invenies in Ecclesia *elatos pastores qui vulnerari potius quam emendare norunt.*" (Isid. Hispal.)

[3] On the present chapter cfr. *Pierantonelli*, tit. 1.

But the Catholic Church, differing herein from the State, has a twofold criminal tribunal, a *forum internum* and a *forum externum*. The State, on the other hand, has only a *forum externum*, for *de internis non judicat praetor*. In the *forum internum* the Church views the punishable act as sin and the punishment as penance, whose aim is rather to correct the sinner than to get satisfaction. Church and State, however, share jurisdiction in regard to such criminal acts as belong to the *forum externum* and for which punishment is inflicted as a retribution. But the question whether the criminal cause belong to the ecclesiastical or the secular court depends upon the preliminary question whether the particular cause lie within the competency of the one or the other legislative power. To solve, in some degree, this preliminary question, ecclesiastical penalties are divided into spiritual and temporal.[1] Spiritual punishments consist in the withdrawal of spiritual goods, rights, and offices. Temporal punishments have the loss of temporal goods and rights for their object.

There is no doubt that the Church has the power to impose spiritual punishments. . . .[2] The Church, as history teaches, has in fact, when not prevented by the State, inflicted all kinds of temporal punishment except those of death and mutilation. The State has not as yet anywhere sought to set aside on principle the right of the Church

[1] *Moulart*. L'Eglise et l'Etat. 424.

[2] The author in the passage here omitted, having stated that the Church should not, in fact cannot, punish by death or mutilation, and that as regards other corporal or temporal penalties the Church has certainly a historical or prescriptive right to inflict them, maintains that such a right cannot be proved "by principles," i.e., as we understand the phrase, from the very nature and constitution of the Church. To us the affirmative seems, on theological grounds, the only safe opinion. Consult *Murray*, De Ecclesia, vol. iii. pp. 103, 119 ff.; *Tapparelli*, Saggio theoretico § 1483 ff.; *Stremler*. p. 13 ff.; *Craisson*, n. 5501 ff.; *Schneeman*, Die kirchliche Gewalt, § ii.; Cavagnis, i. n. 279 ff.

to institute and carry out disciplinary and criminal proceedings before its own ecclesiastical courts in disciplinary and criminal causes against clerics.

5. The State, however, has but too often invaded the sphere of ecclesiastical jurisdiction, partly by denying and restraining the Church's right to inflict temporal punishments and partly by usurping jurisdiction even in purely spiritual matters. The plea for this usually was that the Catholic Church had on her part, as shown by history, invaded the jurisdiction of the State. The truth is that whenever the Church sat in judgment over purely temporal matters this right had been conceded to her by the State, as was the case under the Christian Roman emperors; or the people, unable to get any justice from the shattered and impotent secular authority and its courts, turned to the Catholic Church who had a nicely wrought system of criminal procedure even at the time when in the secular courts the proof of a crime committed was as yet supplied by the wager of battle, the ordeal, and the torture. The Catholic Church can never acknowledge the jurisdiction of the State in purely spiritual matters. She has ever repelled it; the last time in the bull *Apostolicæ Sedis* of Pope Pius IX., October 12, 1869.[1]

In other matters Church and State stand apart from each other as two independent powers who had best regulate their common affairs by a mutual agreement, in a similar way as was done for the courts of the Papal States by the Secretary of State, Cardinal Bernetti, in November, 1831. The best way to solve this difficult problem history and reason have always shown to be this, that the Catholic Church cultivate a wise criminal legislation and practice, and especially provide for a well-regulated criminal procedure; then, that the State lend her its physical power, wherever she may need it to en-

[1] Also in §§ v., vi., prop. 19, 20, 30, 41, 44, *Syllabus*.

force her criminal laws. The State would thus fulfil its duties as well as better attain its objects.

If, however, the Catholic Church and the State, each being independent, cannot agree on this common domain, a conflict will naturally arise between them.[1] In such a case the Catholic Church, ever inclined to peace, will yield in point of fact and as far as she can without endangering her own existence, founded as she is by God and destined to last to the end; but at all times she will firmly maintain her inalienable rights. Where these cannot be fully and freely exercised, as is the case at present in many European countries, e.g., in Prussia, she allows them to lie dormant for a time, and is satisfied with imposing such penalties as naturally cannot be grasped by the physical power of the State.[2]

CHAPTER III.

SOURCES OF THE PRESENT CANONICAL CRIMINAL PROCEDURE.

6. Three elements of a regulated criminal procedure, viz., the *accusation*, the *trial*, and the *judgment* which constitute its essence, belong to the natural law. To these essential elements of every criminal procedure the ecclesiastical judge of the first centuries of Christianity would add, from the Roman law, such rules and regula-

[1] On the Pre-eminence of the Church over the State see *Card. Hergenroether*, Cath. Church and Christian State, vol. ii., essay xiii., part i.; also *Card. Tarquini*, Jus Eccl. Publ., l. i. n. 33 ff., "De statu conflictus," and again n. 55 ff.; *Cavagnis*, i. n. 350 ff.; *Allies*, Church and State, pp. 70 ff.

[2] Cfr. the pertinent remarks on the *privilegium fori* in *The Pastor*, ii. pp. 193.—As a historical commentary on this whole chapter read *Card. Hergenroether*, l. c., essay xv., "Eccl. Jurisdiction."

tions as appeared to him useful for his purpose. Thus simply by practice was formed the so-called *Procedure by way of Accusation*, analogous to the Roman, and adopted by Gratian in the *Decretum*. It remained the usual criminal procedure till the time of Pope Innocent III., whose legislation marks an epoch even in the history of secular criminal law. It was he that brought forth a new work, the *Procedure by way of Inquisition*.

The greater number of Papal ordinances concerning ecclesiastical criminal procedure are contained in the Decretals of Gregory IX., first, second, and fifth books, which modify many older rules contained in the *Decretum Gratiani*. The later Popes down to the Council of Trent have made but few new regulations. The *Corpus Juris Canonici* does not itself contain a complete system of ecclesiastical criminal law. This has to borrow from the Roman law many maxims, of which only some, i.e., such as could be modified, are received in the canonical law books. For points of criminal procedure which are wanting in the *Corpus Juris Canonici*, practitioners and canonists of all times refer to the *Corpus Juris Civilis* as containing a source of valid law for the Roman, i.e., the Catholic Church. Besides, the laws of civil and criminal procedure were formerly not so sharply distinguished as at present, and many rules of civil procedure were applicable in criminal trials.

7. Thus, indeed, the Council of Trent found a complete system of ecclesiastical criminal procedure of which the foundation was the *Corpus Juris Canonici*, but the complement in the *Corpus Juris Civilis*. The Council of Trent effected many and especially radical changes in criminal jurisdiction, and introduced the important *Sententia ex informata conscientia*.

Since then, however, the development of the law in this particular has not been at a stand-still. It is pre-

cisely the law of criminal procedure, more than any other part of public law, concerning which the views of the times depend upon the existing political conditions, and where the intellectual and moral development of the several nations and states must be taken into consideration. But more especially is to be borne in mind that criminal procedure is but a means to an end. This end, indeed, must always necessarily be attained, yet the means thereto are different. Of these now one then another may appear more appropriate according to circumstances and views. Finally, one cannot ignore the fact that science also has made progress upon this field.

Since the Council of Trent the Popes by enacting for the whole Church general norms only of criminal procedure, have made little allowance to the needs of the time. We may except the celebrated Constitution of Benedict XIV., *Ad militantis*,[1] by which he abolished some abuses in appeals and inhibitions. Development of the law in this particular could only proceed by way of custom and special legislation. Yet even the ecclesiastical law of custom, especially after the Church has attained her immense international extent, can be only particular or local law. This becomes still more evident when we consider how differently civilization was developed among the nations, and how manifold and various were the relations between Church and State.

The Catholic Church has everywhere within the last centuries endured great trials; in Germany, in particular, other ecclesiastical societies combined with the temporal power to oppose her. In many other countries she could not for a long time exercise her criminal jurisdiction in the manner desired by Canon law, much less could she think of further development in the proper sense.[2]

[1] See *Appendix*.

[2] The author gives here a very short sketch of the history of Canonical

Of the highest importance for ecclesiastical jurisprudence everywhere is the progress of canonical criminal law in Italy. There the Popes themselves continued to legislate on criminal procedure, a duty which they could the less forsake that they had also temporal dominion over the Papal States. They usually availed themselves of the Congregation of Bishops and Regulars to issue new ordinances for the canonical trial. Clement VIII. and Urban VIII. issued decrees touching appeals and inhibitions, which Benedict XIII. expounded at the Roman Council of 1725, where he also abolished the oath of the accused. After Benedict XIV. had by the aforementioned constitution *Ad militantis* regulated the same matter, Pius VII. by the bull *Post diuturnas* defined the competency of the Congregation of Bishops and Regulars in criminal matters. In fact this Congregation has in the present century issued a series of important decisions upon ecclesiastical criminal procedure, e.g., upon the legalization of causes in 1832, on appeals and appellate courts in 1835 and 1851.[1]

8. On June 11th, 1880, our present gloriously reigning Pope Leo XIII. issued, through the Congregation of Bishops and Regulars, an instruction for ecclesiastical courts on the *summary process in disciplinary and criminal cases against clerics*, which deals almost exclusively with the mode of procedure and is formal law for Italy only.[2] This instruction is the more remarkable and important that it comprises the most essential rules of canonical procedure which the Roman Congregations for the last

Procedure in Germany. For any one desirous of following the historical development of Ecclesiastical Criminal Law since the Council of Trent, in Austria, France, Germany, and Italy, we know of no better source of information than the famous "*Collectio Lacensis Conciliorum Recentiorum*," 5 vols., published by Herder in Freiburg, Baden, 1870 ff.

[1] See *Appendix*.

[2] See Preface.

three centuries have held to be applicable, and have themselves made use of, although not so much for their own tribunals where some departure from ordinary procedure takes place, but rather for the courts of the lower instance, the legal validity of whose causes they have to examine as appellate courts or higher instance. With only a few exceptions that instruction is composed *verbotenus* of the numerous rescripts of those Congregations. It is, in one word, the result, compressed into short paragraphs, of the development of ecclesiastical disciplinary and criminal procedure as it progressed in the course of centuries formally and explicitly in Italy, substantially in the whole Catholic Church.[1]

It would appear that the result of the growth of particular laws on ecclesiastical procedure, being influenced by so many different agents, should be exceedingly varied and unequal according to different countries, provinces, and dioceses of the Church. Yet if we compare them so far as they are accessible to us, we find a remarkably slight difference. This circumstance arises from the fact that the gradual advancement started from an already well-developed and solid foundation, the general Canon law, and progressed but very slowly. Besides, there was Italy and especially Rome, where on account of the larger practice the development was always a few degrees in advance, to serve as a standard. Not only that. The various particular laws found also at Rome their centre of unity; for besides the fact that the positive *leges scriptae particulares* were to be submitted to the Popes for examination and approbation, there was at Rome the supreme court where all complaints and

[1] "It would seem that in this Italian *Instruction* we have the groundwork of what is destined to become the mode of proceeding in criminal and disciplinary causes of the clergy throughout the universal church."—*The Pastor*, II, 194.

recourses relative to criminal trials were finally brought together and acted upon.

The decisions of the Roman Congregations, therefore, in regard to disciplinary and criminal procedure continue to be a steadily flowing source and regulating principle of the law of ecclesiastical criminal procedure.

CHAPTER IV.

PLAN OF THIS WORK.

9. Ecclesiastical criminal procedure cannot be, as experience teaches and as we have already mentioned (n. 3), without just and legally regulated forms, if, on the one hand, the Church would accomplish her object and fulfil her duty of maintaining order and discipline, and, on the other hand, would assure those whom it mostly concerns of the justice of her proceedings. In every criminal procedure we must distinguish between *material* forms, that is, those whose non-observance would make the proceeding void, and *immaterial* forms which may be neglected without the proceeding becoming void on that account,—a distinction very similar to that between preceptive and mere directive rubrics in Liturgy.[1]

The substantial requisites and formalities of procedure must, therefore, be the same in all ecclesiastical tribunals; to depart from, or omit, them altogether as a rule cannot be thought of; for every such proceeding would be eventually amended or simply reversed at least by the highest instance. On the contrary, accidental formalities, mere directive norms may be different in the one and

[1] On these material (essential, substantial) and immaterial (non-essential, accidental) forms, *cfr.* below, n. 50 ff.

the other court according as either the bishop has laid down or practice established obligatory forms; their choice, application, or omission depends upon various circumstances and reasons of expediency.

Canon law contains many cumbersome and vexatious though in themselves quite immaterial forms, taken from the Roman law, and which the canonical codes no less than the older practice declared essential and obligatory. It was on these forms that disputes continually arose concerning the violations of the rules of procedure; and the frequent reversals and long delays of causes brought the whole procedure into discredit, until finally those forms went out of use in one court after the other, as they had already in the supreme court at Rome.

The progress of the Catholic Church at present is of the kind that while internally she is growing in strength and power, yet in unfolding her external life she is confined to the *minimum*. The ecclesiastical law of criminal procedure also has endeavored to divest itself as much as possible of all empty forms, and instead of them to offer better services to justice. It thus happens that almost everywhere in the Catholic Church criminal procedure puts on a summary character, that is to say, it discards all those unsuitable and troublesome forms just above mentioned. Rome herself and Italy give the example.

10. We intend, in the following pages, to give a short systematic exposition of canonical disciplinary and criminal procedure against ecclesiastics. We exclude, therefore, from our treatise the criminal procedure against laymen. Against these the Church nowadays proceeds only in case of very great necessity, viz., when by their conduct they give great public scandal.

In the course of centuries several kinds of canonical criminal procedure against ecclesiastics were contemporaneously and successively in use, but are no longer at

present. Setting aside the *Notorium* and the *Denuntiatio* in its canonical technical meaning, the so-called *Procedure by Inquisition* will be found to be almost the only one in practice. It has, however, nowhere been kept in its purity, but has especially in recent times approached the *Procedure by Accusation.*[1]

We shall occupy ourself with explaining only the ecclesiastical disciplinary and criminal procedure as now in use, and shall keep out long historical discussions, as also the *solemnitates et strepitus judicii.* Still we do not confine ourself to strictly *judicial* proceedings, but speak likewise of *extrajudicial* actions. This with a greater right since the latter often stand in relation to, and connection with, the former and should, whenever possible, precede it. It is in the nature and spirit of the Catholic Church that, where it will suffice, extrajudicial proceedings should be the rule.

In regard to the matter to be presently dealt with, we have only to remark that we shall make use of the sources mentioned in the preceding chapter as they deserve. After what was said there we need not explain why we adhere with partiality to the rules of the *Instructio* of 1880, and why we give it, where it goes beyond the older Canon law, the preference over mere private opinions of canonists. We shall distinctly mark the essential or substantial requirements of the procedure. Directive norms we take, so far as they cannot be found in law books, from decisions of the Roman Congregations. We are ready to hear practitioners object that many things are managed differently with them, and we have no objection if they desire to retain their fond old customs.

[1] See below, n. 47 ff.

First Part.

ECCLESIASTICAL JUDICATURE FOR DISCIPLINARY AND CRIMINAL CASES OF CLERICS.

SECTION I.

ECCLESIASTICAL DISCIPLINARY AND CRIMINAL JURISDICTION.

CHAPTER I.

ORDINARY AND QUASI-ORDINARY JURISDICTION.

11. The powers of the ecclesiastical judicature are divided by canonists of more recent times into *jurisdictio ordinaria*, *quasi ordinaria* or *vicaria*,[1] and *delegata*. This division, though not entirely satisfactory, may yet be kept in ecclesiastical criminal law.

The Pope has jurisdiction over the whole Catholic Church, and each bishop over his diocese. Their jurisdiction is ordinary (*J. ordinaria*), because their offices with and by which they receive jurisdiction are permanent institutions of the Church, and consequently their jurisdiction is permanent and regular. The bishop is the Ordinary *par excellence*. To the ordinaries the instruction *L'Ordinario* is addressed.

The Pope and the bishops have ordinary jurisdiction by divine law. In the course of time positive law resulting

[1] Cfr. *Commentators*, in l. 1. tit. 31.

from previous facts gave ordinary jurisdiction also to Archbishops, Patriarchs, Primates, Exarchs, the Papal Vicars of Thessalonica and Arles, and those Papal authorities in Rome to whom in certain matters the regular power to decide has been granted.[1]

Upon a very peculiar legal title, finally, rests the ordinary jurisdiction which the exempt Prelates with quasi-episcopal authority, the regular chapters, and the Cardinals in respect to their titular churches enjoy.[2]

12. Quasi-ordinary or vicarious (*vicaria*) jurisdiction[3] has this in common with the ordinary, that it is also united with an office, though not always with a permanent one, and that when not limited by statute or the will of the appointer it is generally of the same extent as the corresponding ordinary jurisdiction. From this, however, it differs in that it can be withdrawn not only by criminal sentence, but even at any time and at pleasure by the Pope or by any other person to whom such right belongs. Quasi-ordinary jurisdiction belongs to the chapter *sede vacante*, or more correctly to the vicar capitular;[4] also to the bishop's Vicar-general, the Coadjutor Bishop, and the Vicar Apostolic.

[1] Decision of Gregory XVI., 1840. AJP. XII , 554, 943.

[2] Cardinals have no longer judicial, but only administrative, power over their churches. See *Santi*, l. 1. tit. 31. n. 36 ff.

[3] See *Commentators*, l. 1. tit. 28.

[4] Although with us the Administrator of the diocese, *sede vacante*, holds a similar position as elsewhere the Vicar Capitular, yet his jurisdiction is not *vicaria* or quasi-ordinary, but merely delegated Cfr. C. Pl. Balt. II., n. 96 ff.

CHAPTER II.

DELEGATED JURISDICTION.

13. Whoever holds ordinary or quasi-ordinary jurisdiction has the right, so far as it is not restricted in the latter case, to transfer his judicial power to another, to delegate it. The delegate (substitute) has then power by transfer, mandate, or commission (*F. delegata*, also called *mandata*).[1] Consequently he does not exercise jurisdiction in virtue of his own right, which he originally obtained with an office or the like, but in the name of him who has *charged* him therewith.

We distinguish between *delegatio a jure* (by law) and *d. ab homine* (by official).[2] Delegated jurisdiction is mostly of the latter kind. An instance of the former we have with bishops who by several statutes of the Council of Trent, therefore by law or *a jure*, are made once for all either simply or moreover (*etiam*) *delegati Sedis Apostolicae* for various matters which were formerly reserved to the Pope, or at least were generally administered through his legates. In all cases in which the bishops act simply as (*tanquam*) delegates of the Apostolic See, they have not ordinary jurisdiction, otherwise a delegation would have no sense. On the contrary, in those cases in which they are empowered to act as being moreover (*etiam tanquam*) Apostolic Delegates, ordinary jurisdiction in the matter abstractly considered does generally belong to

[1] *Phillips*, §§ 177, 178. *Bouix*, t. 1. p. 142. *Craisson*, n. 307 and 5572 ff. *Commentators*, l. 1. tit. 29.

[2] In the first case the power to act is conferred upon the delegate or deputy by positive law or statute, whereas in the latter it is derived directly from the principal whose agent the delegate becomes.

them, but some particular circumstance, some privilege, etc., coming between, the object of their jurisdiction becomes differently qualified, the person exempted, etc., so that ordinary jurisdiction now no longer suffices, and consequently the actual jurisdiction of the bishops in the matter is to be considered as being obtained by papal delegation. This seems to us with Hinschius[1] the only true construction of the phrase *etiam tanquam Sedis Ap. delegati.*[2] The question whether in a particular criminal matter the bishop exercise jurisdiction as Ordinary or as delegate becomes practically very important in two cases. For in the latter supposition the metropolitan court is dropped from the order of appellate instances;[3] and when the episcopal see becomes vacant, those delegated powers of the bishop do not pass over to the chapter or the vicar capitular.[4]

To be capable of obtaining delegation to exercise ecclesiastical disciplinary and criminal authority, the delegate must possess the same qualities which in these matters are required of the ordinary judge and which will be spoken of later (n. 24 ff.). Only by reason of being subject to the delegating person as to his superior

[1] Kirchenrecht, I. 178.

[2] The ordinary view is that in those cases the bishop has ordinary as well as delegated jurisdiction, and may act by the one or the other. In case of doubt he is supposed to have proceeded by delegated power, that being the more honorable one as coming from the Pope. *Craisson*, n. 287; *Stremler*, p. 445; *De Angelis*, h. t., n. 2; *Santi*, h. t., n. 3.

[3] The appeal will lie directly to the Holy See.

[4] There is yet another division of delegated jurisdiction; viz. that obtained by *special* or by *general* delegation. By the first the delegate is empowered to transact some single, special matter (*ad unum negotium*); by the latter he is deputed indiscriminately for a whole class or kind, or even several kinds of affairs (*ad universitatem causarum*). Finally, delegation by official may be respectively called *official* or *personal*, accordingly as it was given either in view of the office and rank held by the delegate, or merely because of his personal qualities.

can the delegate be bound to accept the delegation. Hence the Pope can effectively delegate every cleric; but a bishop, as a rule, only his diocesan clergy. However, to decline such delegation, if done so for good reasons, is allowable.

A delegate has not, without the express or implied concession of the law or the principal, the right to transfer to a third party his delegated jurisdiction; he has not, as we say, the right to subdelegate. Such right belongs to Papal delegates (except the delegation be *personal*) and to those who are delegated *in universitatem causarum.* Also when two or more are jointly delegated, any one of them may commit his part to some one else or to one of his fellow-delegates.[1]

14. The jurisdiction of the delegate begins at the moment he receives the written commission (letters-patent) from his principal.[2] Any strictly jurisdictional acts previously done are void; not so, however, simple inquiries made for the sake of information. Upon demand of the parties the delegate must show his credentials. His jurisdiction expires[3] either with the lapse of the time (term) for which he was delegated, or by the final execution of his charge; also the moment he receives notice of a recall by his principal, which the latter is always entitled to make; again by a successful recusation, or by declaring himself incompetent because of defective delegation. After the death of his principal the delegate can only then carry the proceedings to the end, if they are already begun, which is done by the citation of the parties. Delegates by law, however, do not lose their authority by the death of their principal.

[1] c. 6, X., I. 29. *Santi*, h. t., n. 25 ff.

[2] c. 12, X., II. 28. *Santi*, h. t., n. 19 ff.

[3] On the cessation of delegated authority see *Santi*, h. t., n. 33 ff.; *Craisson*, n. 490 ff.

By the death of the delegate himself the delegation terminates, if he was delegated personally and not as the incumbent of an office of fixed duration ; since in the latter case the delegation usually passes to his successor in office. If several were delegated with collegiate or associate power, then, by the death of one the commission of the others also terminates, if he did not subdelegate some one else in proper time (provided he could have done so), and if the proceeding was not already under way.

15. The nature and extent of the delegated power is determined by the written commission of the principal. Delegation is in its nature *stricti juris* (of strict interpretation) and cannot, therefore, in case of doubt be presumed to cover other cases and persons.[1] Going beyond the commission will as a consequence void the proceedings. If several are delegated, then the special mandate passes over the general, and a later one over the earlier.[2] Where special commissions of equal date are given to several delegates *in solidum*, they may agree among themselves to leave the whole cause to one of them. If any doubts arise among them on the powers conferred, and if they cannot themselves settle the question, they must choose according to Canon law arbiters to do it.[3]

An appeal lies from the delegate to his principal; but if a Papal delegate has sub-delegated his whole commission, he drops from the order of instances and the appeal is taken immediately to the Pope. Likewise, in case he had given over part only of his commission, if he die or the major excommunication be passed upon him. When

[1] S. C. C., 22 May 1875; apud *Acta S. S.* VIII. 675.

[2] *Commentators* in l. 1. tit. 3, "de rescriptis." *Santi*, h. t., n. 26 ff.

[3] c. 16, X., h. t. On *Arbiters* cfr. *Commentators* in l. 1. tit. 43. We omit here from the author's text a paragraph on joint delegation. Cfr. on the subject *Santi*, l. 1, tit. 29. n. 25 ; *Craisson*, n. 5575 ff.

two of the three delegated judges have transferred part of their authority to two other persons, and now these sub-delegates proceed, in the matter committed to them, jointly with the third delegate, then the appeal from their decision does not lie to the first two delegates, but to the original mandator.[1] Again, an appeal may be made from a sub-delegate *in partem* on the plea that the principal died before either the delegate or sub-delegate had in any manner begun the action. In this case the appeal would have to go, not to the delegate, whose jurisdiction is denied, but rather to the principal. The same must be observed in all cases where the jurisdiction of the delegate is put in question. For by appealing on that plea from the sub-delegate to the delegate the appellant would at the same time admit and yet deny his jurisdiction, and thus contradict himself.[2]

CHAPTER III.

DISCIPLINARY AND CRIMINAL JURISDICTION OF VICARS GENERAL.

16. The vicar-general[3] is the ordinary representative of the bishop also in criminal jurisdiction. His jurisdiction, however, ceases when the bishop himself conducts proceedings; it is suspended, if the bishop or himself be suspended, interdicted, or excommunicated; it terminates immediately with the death of the bishop, in whatever stage the cause may happen to be. In this, indeed, it

[1] c. 3, in 6°, I. 14.

[2] c. 14, ibid.

[3] Commentators deal with this question under tit. 28, *De officio vicarii*, l. 1. *Bouix*, I. p. 413 ff.; *Craisson*, n. 1162.

differs from delegated jurisdiction by which the delegate can at least finish a proceeding already begun. Besides, the vicar-general can be dismissed at any time, at the pleasure of the bishop.

This jurisdiction of the vicar-general, however, does in no way extend to all criminal matters. In some acts, as we shall see later, he cannot represent the bishop at all. According to law and custom, general criminal jurisdiction is not conferred by the instrument by which one is appointed vicar-general. In fact, he is deprived of almost all criminal jurisdiction, especially in more weighty matters.[1] Even those faculties which are otherwise generally contained in such a commission, the bishop can withhold.

Criminal judicial powers, however, though not contained in his general commission, may be given to the vicar-general by a special mandate from the bishop, except in the cases reserved by the law. This can be done in two ways, either for all cases that may arise, or only for a single case that has already arisen. In the first case, the transfer will hardly be made otherwise than upon the vicar-general as such, so that in virtue of a special mandate given in his letters of appointment, he exercises criminal jurisdiction in general or with certain restrictions as vicar-general or representative of the bishop, and not purely as delegate. In the second case, when he is clothed with special power for a particular cause, it may sometimes be doubtful whether it was conferred upon him as vicar-general, or whether he has only become a simple delegate. This question is practically of great importance, for no appeal lies from the vicar-general as such to the bishop; but it does, when he acted only as episcopal delegate. As his commission, however, is in every case conferred in writing, recourse must first

[1] *Santi*, l. 1. tit. 28, n. 32.

be had to that document. If this do not solve the question, the presumption, at all events, is in favor of his being charged as vicar-general, and that, consequently, no appeal lies from him to the bishop. Exactly the same principles are applied, *mutatis mutandis*, when there are several vicars-general. In that case the criminal jurisdiction is often conferred on one of them only, who in some places bears the name of *Official*.[1]

17. The vicar-general, as he is not the Ordinary himself, and is, therefore, not presumed to have authority in all criminal causes, must in the exercise of his criminal jurisdiction prove his authority to the interested parties, provided it have not already been made officially known. His powers must each be shown from his written mandate, to explain which custom may even of itself suffice. Yet to prevent the proceedings from being subject to abatement, it will generally be better to have recourse to the bishop, that he may himself authentically interpret the commission.

In the same manner we must answer the next question, whether the vicar-general can, in a particular case, delegate or perhaps even sub-delegate. This question is, as a rule, to be answered affirmatively. In case of the bishop being absent, the vicar-general, if sick or otherwise prevented, has the right to sub-delegate another for the most urgent cases. Such sub-delegate would retain his authority, even if the vicar-general should die, until the bishop shall have further provided.[2]

[1] Cfr. the interesting article s. v. *Officialité* apud *Prompsault*.
[2] S. C. Epp., 12 Aug. 1833. AJP., XIII. 69, 899.

SECTION II.

COMPETENCY OF THE ECCLESIASTICAL JUDICIARY.

CHAPTER I.

PERSONAL, REAL, AND APPELLATE COMPETENCY.

18. All criminal and disciplinary causes of bishops[1] which are punishable with deposition or privation of the benefice, the Pope himself decides in the first instance. If an inquiry is to be made at the place of the delict or delinquent, he can delegate for that purpose an archbishop or a bishop only, and that by instrument signed under his own hand; minor transgressions of bishops can be acted upon by provincial councils, who may delegate others for the purpose.[2]

As we have before observed, the Pope has full jurisdiction over all ecclesiastics of the whole Church. There-

[1] On the subject of this section cfr. *Commentators*. l. II. tit. 2, "de foro competenti." Also *Bouix*, I. p.242; *Craisson*, n. 5653; *Smith*, n. 781; *Sanguineti*, n. 547. We use the term *competency* in the meaning that it has in Roman or French law, in which, however, it seems to be seldom used by American or English writers. They prefer the term *jurisdiction* or the Latin *forum*. See *Bouvier*, h. v. *Real competency* is sometimes termed *jurisdiction of the cause*, as distinguished from *j. of the person* and *j. of the place*. The same threefold distinction is observed by canonists. "*Competentia procedit ex ratione territorii . . . vel ex natura causae . . . aut ex qualitate personarum.*" (*Santi*, h. t, n. 3.)

[2] *Conc. Trid.*, S. XXIV., c. 5, de Ref. See the report of the trial of Jean Soanen, Bp. of Senez, by the Provincial Council of Embrun, France, 1727 (*Coll. Lac.* cit., vol. I. pp. 655–742).

fore his jurisdiction over the clergy who are subject to bishops is, in the first instance, concurrent with that of the bishops. He should, however, according to the decree of the Tridentine Council,[1] only then assume jurisdiction in disciplinary and criminal causes in the first instance, and by passing over the episcopal instance, when the proceeding has been pending in the episcopal court already for two years without judgment having been rendered, or when the parties have with the consent of the bishop applied to him. For all disciplinary and criminal causes, even the greater ones of his secular clergy, as likewise for transgressions of regulars which have taken place outside of the monastery (provided the superior of the order do not take action in proper time[2]), cognizance in the first instance belongs to the bishop,[3] that is, in general to the Ordinary, or to whoever is by law or by mandate his representative. Such are usually the Coadjutor bishop, the vicar-general, or Official, and *sede vacante* the vicar-capitular. From their sentence, however, no appeal can be taken to the bishop (unless it be quite certain that they acted merely as the bishop's delegates, a rather unusual thing in such matters), because their court and his are but one instance.[4]

19. Appellate judges in the second instance[5] are the

[1] S. XXIV., c. 20, de Ref. Cfr. Bened. XIV., *Ad militantis*, § 42.

[2] *Conc. Trid.*, S. XXV., c. 14. de Regul. et Mon.

[3] Ibid., S. XIII., c. 4, de Ref.

[4] From a decision of the S. C. C., 20 Dec. 1873, the *Acta S. S.*, VII. 575, argue *Episcopum cum suo consistorio sive curia unum idemque tribunal constituere.* On the vicar-capitular cfr. Ferrari, tit. 7, 21.

[5] Although the Holy See has an unlimited right to receive appeals from the first instance, it is yet a maxim of Canon law also, that appeals should not be made *per saltum* (*Conc. Trid.*, S. XXII, c. 7, de Ref.), i.e. passing by the intermediate appellate court. Still where this rule cannot be easily observed, an appeal from the Ordinary may be taken immediately to the Holy See. This was customary in the Province of Westminster until 1884, and is still left free to the clergy of Ireland. (See

Metropolitans. In respect to causes which the metropolitan decided in the first instance as Ordinary of his diocese other provisions must be made.[1] In Prussia the

Pl. Syn. Maynooth, 1875, n. 265.) In the postulate of the French bishops at the Vatican Council they say: *Appellationes ad S. Sedem omisso medio secundae instantiae, metropolitani scilicet, non deberent admitti.* Similar requests had been made long before at the Council of Trent. (*Martin*, p. 155 f.) In the United States an appeal to the metropolitan in the second instance was first made obligatory by the Provincial Council of St. Louis, 1855, whose decree was sent by Rome's request to the other American Provinces as a norm to follow. It was again formally adopted by the second plenary Council of Baltimore, 1866, in n. 77. In the same Council the Apostolic Delegate was requested by the S. C. Prop. to insert as one of the rights of the Archbishops (which the fathers had omitted from their enumeration) to receive appeals from the sentences of their suffragans (n. 81, IV.). The same is again implied in the Instruction, art. 33, 41. See *Rota*, n. 807.

[1] By the general law of the Church an appeal from the metropolitan either as such or even as Ordinary lies immediately to the Holy See. Yet that his own subjects might have the same privilege as his suffragan clergy, namely, to carry an appeal to two higher courts, and in order to expedite matters by bringing the case to a nearer tribunal, different ways have been adopted according to various conditions. Three of them deserve special mention. First, the metropolitan has two distinct tribunals, one the diocesan (of the first instance), the other the metropolitan (of the second instance). To the latter go all appeals whether from his own diocesan or from the suffragan courts. Such an *Officialité métropolitaine* (*auditorium metropoliticum*) was ordered by the Provincial Councils of Rheims (1849), Albi (1850), and seems to be generally established in France and in Prussia. Another way is to make the senior suffragan the judge of the second instance for cases from the metropolitan's own diocese. This, we think, is the case in Bavaria, and has been by decree of the S. C. Prop., 20 June 1884, made the rule for the diocese of Westminster. A third mode, finally, is to carry the appeal from the metropolitan of the first instance outside of the province to another, mostly neighboring, metropolitan. This happens in Austria and with us in the United States. The third plenary Council of Baltimore, n. 316, has expressly ordered, by special concession of the Holy See, that in the present case an appeal shall lie *ad Metropolitanum viciniorem*. A motion was made at the same Council, if we are rightly informed, to decide at once which one should be considered for each metropolitan his respectively *nearest* appellate court. But we have never heard of the decision.

metropolitans of Cologne, Breslau, and Ermeland have their own courts of the second instance, Gnesen and Posen are assigned to each other as such. In Bavaria, Augsburg is delegated in this respect for Munich-Freising, and Würzburg for Bamberg. In Austria, Prague is the court of second instance for Vienna and Salzburg, Olmutz for Prague, and Vienna for Olmutz.[1]

For disciplinary and criminal causes of bishops, which the provincial council decided in the first instance, Rome, of course, would be the next appellate court.

20. Judge in the third and last instance in disciplinary and criminal causes of clerics is the Pope,[2] who for that purpose avails himself either of his Curia at Rome, or of delegated judges in the several dioceses. The conditions for the delegation of the latter are specially regulated. The Council of Trent, namely, ordained[3] that at every provincial and diocesan synod at least four qualified ecclesiastics should be chosen, and their names presented to the Pope (*judices synodales*).[4] Later on, Benedict XIV., *Quamvis paterna*, August 26, 1741, §§ 3–6, ordered further that where for some time no synod could be convened, the bishop, after having consulted the chapter, shall choose and present to the Pope such qualified clerics (*judices*

If geographical distance were to decide, Chicago, e.g., would be appellate court for Cincinnati, Milwaukee, and St. Louis; St. Louis would be such for Santa Fé, and New Orleans; Philadelphia, for Baltimore and New York, etc. Boston, New Orleans, and Santa Fé would be free.

[1] *Phillips*. § 179, note 11.

[2] In some countries the Holy See has recently, by special delegation, established permanent appellate courts of the third instance. Such a one is, e.g., the metropolitan court of Prague for all causes being carried there from the second instance at Olmutz and Lemberg. Thus in Bavaria, Munich and Bamberg are for each other courts of the third instance.

[3] S. XXV., c. 10, de Ref. (with decisions of S. C. C. ap. *Richter and Schulte*, p. 457).

[4] Cfr. *Bened.* XIV., de Syn. D., l. IV. c. 5; *Santi*, l. I. tit. 29, n. 14 ff.

prosynodales). These synodal and prosynodal judges do not as yet by their election and presentation obtain any kind of jurisdiction, but they are for each particular case delegated by the Pope himself, and are then Papal delegates.

Here, however, arises a difficulty. In the first instance the bishop himself, possibly, was the judge; in the second instance it was the metropolitan; but for the third instance inferior clerics are delegated by the Pope, and may, perhaps, reverse or annul the episcopal and metropolitan sentence. That this would impair the judicial authority of the bishop is evident. In view of this the Tridentine Council had in the beginning prescribed that the Pope should delegate an archbishop, or at least a neighboring bishop.[1] But as this was for the most part not practicable, the Council abandoned it by the aforementioned enactment concerning synodal judges. Yet, where possible, only such clerics should be elected who hold a dignity, a personate, or a canonry.[2]

21. This mode, however, is not much in practice at

[1] S. XIII., c. 2, de Ref.

[2] c. 11, de Rescript. in 6°, I. 3 —As the English equivalent for the latin *Personatus* we retain the noun *Personate*, used by Waterworth and Walcott. The term *persona* (person), used in Civil law, would rather indicate the holder of a personate than that itself. To understand the meaning of the term one must remember that at least since the twelfth century the different ranks among the diocesan clergy, especially that of the cathedral church, used to be characterized respectively as *dignitas*, *personatus*, and *officium*. Dignity meant a benefice to which jurisdiction and pre-eminence of honor were annexed—e.g. the vicar-general; personate, a benefice with which honorary pre-eminence but no jurisdiction was joined—e.g. a canon; office finally, a benefice without jurisdiction and any special honor—e g. the sacristan of the cathedral. In modern times, however, what are *per se* mere personates have been made dignities by papal privilege. Such is the case with the provost (*praepositus*) of cathedral chapters in England and, we suppose, in Canada. Cfr. *Irish Eccl. Record*, III. Series, VIII. 399.

present, but when an appeal is carried to the Pope, the Roman Curial authorities decide the cause, and even they do not delegate special judges of inquiry, if the facts in the case are not yet sufficiently clear; but they will send to the bishop very definite instructions how to conduct a further inquiry.[1]

The real competency (jurisdiction of the cause) of the various papal courts is not regulated according to precise and uniform principles, but rests throughout on an historical basis. We cannot, however, give here the history of their competency, which is connected with the history of their institution.[2] We are content to enumerate some of the disciplinary and criminal causes, to decide which the several Congregations are competent. In case of doubt they themselves must of course decide as to their competency. A wrong address in an appeal would not indeed be prejudicial, as the Congregation addressed will send the cause to the competent one.

To the competency of the *Congregatio Inquisitionis* (S. C. Inq. or S. Off.) belong: heresy, polygamy, solicitation in the confessional, keeping of prohibited books, offending against abstinence, celebration of Mass or hearing confessions by one not a priest, public veneration of one not canonized or not beatified, astrology, and divination. This Congregation has, however, a peculiar procedure, adapted to the nature of the matters belonging to its competency.

To the *Congregatio Episcoporum et Regularium* (S. C. Epp.) are assigned all other disciplinary and criminal matters of clerics; and in particular also, by the bull *Post diuturnas* of Pius VII., 30 Oct. 1800, all complaints or re-

[1] S. C. Epp., 24 Nov. 1814. AJP., XII. 865, 772; XX. 87.

[2] Consult *Stremler*, l. c., p. 3ième, "Des Congregations Romaines;" *Haine*, La Cour Romaine; *Bouix*, De Curia Romana; *Bangen*, Die Römische Curie; *Dublin Review*, O. S., XXVI. p. 338.

courses in criminal proceedings, so far as they do not perchance belong to the next Congregation.[1]

The *Congregatio Concilii* (S. C. C.) is competent for those disciplinary and criminal matters which are regulated by the Council of Trent.[2]

The *Congregatio Immunitatis* (S. C. Imm.) has to decide between ecclesiastical and civil jurisdictions.[3]

CHAPTER II.

LOCAL COMPETENCY.

22. No question can be raised as to the local competency of the Holy See. It alone embraces the whole world. There are, however, many jurisdictions of the second instance and a great many of the first. The question therefore is, which one of these is individually competent for the particular case to the exclusion of all other similar authorities?

This individual competency of a judicial authority, which forms the *forum*, the tribunal in the proper sense, is now usually determined geographically. By the forum of the accused or defendant we understand his duty to answer to the charge before a stated court, and the right not to answer before any other.

[1] Decisions of this famous and important Congregation were collected by *Bizzarri*, and over a thousand *décrets inédits* are published in the AJP., série XI. ff., to which Droste so often refers.

[2] There are two famous collections of the decisions given by this Congregation—a summary one, very handy for quick reference, by *Zamboni* (new edition, 1860, 4 vols.); the other, full and extensive, by *Pallotini*, still in course of publication (Rome).

[3] The famous collection by *Ricci* of the decisions of this Congregation was republished with additions and supplementary documents by Canon *De Montault* (see list of authors).

The territory which the members of the Catholic Church and in particular their clergy inhabit is divided in regard to the administrative as well as jurisdictional power into many districts, defined by local limits, i.e. dioceses, at the head of which are the Ordinaries, each of whom exercises jurisdiction over his whole district. Hence it follows that the Ordinary is the judge over all clerics who live in his district, if they are not exempt from his jurisdiction by law or privilege. By reason of their domicile they are subject to him; their *forum* lies with him, particularly in disciplinary and criminal matters. How the dependence of the cleric upon his bishop goes on increasing from his birth to his admission into a benefice is beautifully expressed by the *Acta S. S.*, VI. 587, in reference to a decision of the S. C. C., 12 Sept. 1871. They say:

"I. Fundamentum legitimi exercitii episcopalis auctoritatis in certum populum certumque Clerum esse ipsum territorium dioecesanum, cui Episcopus canonice praesideat. II. Quare omnes, qui cum territorio sint aliqua stabili ratione colligati, sive ratione originis et domicilii, sive ratione tantum domicilii, obnoxios regulariter esse eidem episcopali auctoritati. III. Accedente sacra Ordinatione aliud vinculum cum episcopali auctoritate obstringi, ita ut non solum ratione territorii sint clerici eidem subiecti, sed etiam ratione s. Ordinationis, qua membra evadunt dioecesanae hierarchiae. IV. Fortius eiusmodi secundum vinculum esse, si Clericus cum peculiari ecclesiastico officio seu beneficio in bonum dioecesis erecto, colligetur."

The *Instructio*, art. 1, also alludes to the *forum domicilii* when it says that to the bishop belongs the discipline and correction of clerics who are subject to him (*a se dependentium*). Even from this it appears sufficiently that now at least in disciplinary and criminal cases the *f. domicilii* must be admitted. It has been maintained that formerly it had no application; that for criminal matters Canon law knows only the *f. delicti commissi*. This is false. Canonists agree in teaching that jurisdiction of

the domicile is concurrent with the other kinds of general forum. And the *Acta S. S.*, II, 141, draw the following conclusion from a decision S. C. C., 28 Jan. 1865: *Quamvis regulariter quis forum sortiri dicatur, juxta caput Licet de for., comp., ratione delicti, contractus, domicilii, rei sitae; tamen domicilii forum dici et esse naturalem et ordinarium, et cum ceteris concurrentem.* Hence we hold that the *f. domicilii* concurs electively with the other jurisdictions in ecclesiastical disciplinary as well as criminal causes.[1]

To establish a domicile, we briefly observe, two constituents are required: the intention to make a certain place the centre of one's activity, and the actual residence there. Numberless times have the Roman Congregations declared (to use the words of the *Acta S. S.*, IX. 414): *Locum domicilii alicujus esse illum in quo facto et animo manendi moratur.* A cleric has his domicile usually where he has a benefice entailing his obligation to reside there. The *f. domicilii* does not, however, suffice for disciplinary and criminal cases; circumstances may arise which demand another jurisdiction. A mere stay, short or long, in a diocese does not effect a forum there, except in Rome. This latter and, assuredly, exceptional way of acquiring a forum by mere presence is an old remnant from that time when the Papal jurisdiction, even in the first instance, did very commonly concur with that of the bishops in the whole Church.[2] But if official business or his own affairs with the Curia brought the cleric to Rome, he has the *Jus domum revocandi*, the right of demanding to be dismissed to the jurisdiction of his domicile, there to receive his sentence.[3]

[1] *Bouix*, II. p. 300, explains the following thesis: *A foro delicti non tollitur forum domicilii, sed ambo cumulative coexistunt*

[2] The same special privilege for Rome is found in the Roman law under the Emperors.

[3] c. 20, X., h. t., II. 2.

23. Besides the *f. domicilii*, the place where the act was committed establishes another forum for the delinquent, the *f. delicti commissi.* According to this the bishop can bring before his own court the cleric who has committed an offence in his diocese, although he belong to and reside in another diocese. The only difficulty here may arise by the question, which is in face of the law the *place* of the act? which, e.g. in an offence through the press?[1] According to the correct view the *f. delicti* is in the place where the offender acted and not where the effect appeared.[2]

The *f. domicilii* and the *f. delicti* will often be the same, though not always. In the latter case they are concurrent, i.e., either the bishop in whose diocese the offender has his domicile can try the case, or he in whose diocese the act was committed. But as one can be tried only once for the same offence, prevention[3] must in his case determine the competent forum. Sometimes the judge by prevention will try the case and give sentence, but yet, either by the law or from the nature of the case or by agreement, will leave the execution to the concurrent jurisdiction. A *f. deprehensionis*, the jurisdiction of the place where the criminal is arrested, the Church does not need.[4] It would moreover be useless at present, since the Church has no longer a *familia armata.*

[1] The author living at a different place from where his book is published.

[2] Cfr. *Grandclaude*, II. p. 25.

[3] *Forum praeventionis* is the right, obtained by prevention, of a judge to try a cause over which he has concurrent jurisdiction with another judge. The judge who first takes hold of the case, which is done by the citation (summons), is said to *prevent* (get the start of, or stop) the other. Again, as soon as the offender is summoned for the trial, he is said to be *praeventus*, i.e. hindered and stopped from evading the summoning court. Cfr. *Schmalzgruber*, h.t., n. 136.

[4] There are not a few who hold that Canon law does not recognize such a forum. Justinian abolished it from the Roman law.

A so-called *forum prorogatum*,[1] in which the parties may by agreement choose any judge competent in the matter, is in its nature excluded from the criminal procedure. If, with the consent of the bishop and the parties, the trial of a criminal case is committed to a judge who has *per se* no jurisdiction over the cause, such a forum is not to be called prorogated, but simply delegated.

The court itself must decide as to its personal, real, and local competency. In case of conflict between several courts, the decision rests with the common next higher jurisdiction. But where judicial proceedings have once rightfully commenced, the forum there acquired remains.[2]

[1] *Schmalzgruber*, h.t., n. 143.—In the Scotch law it is called *Prorogated Jurisdiction*. It is not the same as *Prorogation* in our Common law, but in part corresponds to its *Change of venue*.

[2] c. 19, X. h. t.

SECTION III.

ORGANIZATION OF ECCLESIASTICAL CRIMINAL COURTS.

CHAPTER I.

PERSONNEL OF THE COURT.

Art. I. The Judge.

24. The chief official in ecclesiastical disciplinary and criminal courts is the judge.[1] The qualifications necessarily required for the judicial office are determined partly by the nature of such office, partly by positive law.[2] The insane as well as minors are unfit for the judicial office, because they lack the necessary mental faculties. The same applies to the deaf and dumb, and the illiterate. A person under the age of eighteen cannot be appointed judge except by the Pope; if aged from eighteen to twenty, he could be appointed only with the

[1] The judge, whether ordinary or delegate, and his office, duties, and qualifications are the subject-matter of titles 23–33 in the first book of the Decretals. Commentators must be consulted under those titles. Of other writers, cfr. *Bouix*, vol. i. p. 120 ff.; *Craisson*, n. 5540 ff.; *Smith*, n. 710 ff. On the moral obligations of all the higher and lower officers of the court consult the treatise *de statibus particularibus* by *St. Liguori*, l. v, n. 192 ff.; *Scavini*, vol. i, n. 518 ff.; *Konings*, n. 1052 ff. For an interesting historico-canonical treatise on Ecclesiastical Courts and their proceedings, we refer to *Van Espen*, p. III.

[2] *Sanguineti*, n. 542, tersely states these qualities by saying that a judge must be *idoneous* (being fit for the office), *legitimate* (having got jurisdiction by lawful way), and *competent* (having jurisdiction in the very cause he tries).

consent of the parties.[1] Further, a person suspended, interdicted, or excommunicated shall not be judge. *Infamia juris* or *facti* also disqualify for the judicial office.[2]

According to the rules of Canon law, the judge in disciplinary and criminal causes of ecclesiastics must be himself a cleric.[3] Canonists maintained this to be required by divine law; but theologians denied it.[4] The latter are undoubtedly right, as the Pope not only can, but did in fact, dispense[5] from such rule.

But a cleric who married, although he had previously received only minor orders, is no longer qualified;[6] nor can he again become so even by episcopal delegation.[7] As is evident, the bishop can much less make use of the civil courts against his clerics.[8]

The above-mentioned defects render a judge in all cases incapable of acting in criminal causes against ecclesiastics. There are still others which render him incapable only in particular cases or in certain circumstances. Most of these cases are covered by the axiom that no person shall be judge in his own cause. Therefore a judge is excluded if he or his nearest relations or his household are either plaintiffs or defendants; for the causes of his relations or of his household are considered as personal causes of the judge.[9]

[1] c. 14. X, 1. 29.

[2] The verse embodying the quality of a judge delegate may be, with the exception of the seventh, properly applied to the ordinary judge. Thus:

Liber, mas, gnarus, cui sit mens, integra fama,
Aetas, qui subsit: committitur huic bene causa.

[3] c. 2, X. II. 1; c. 18, X. II. 2. See *infra*, n. 29, and note, 1, p. 52.

[4] AJP., XI. 412.

[5] 7 Dec. 1855. AJP., XX. 162.

[6] S. C. Imm., 1775, and 24 Sept. 1781. AJP., XIII. 45, 49, 50.

[7] S. C. Imm., 30 June 1832. AJP., XIII. 45, 51.

[8] S. C. Epp., Dec. 1737. AJP., XI. 822, 338.

[9] The circumstance of near relationship or familiarity does not exactly render the judge unfit (*inhabilem*), but rather *suspect*. Cfr. *Santi*, l. 1, tit. 29, n. 40. See, *infra*, the article on Recusation, n. 77 ff.

25. A criminal sentence which is brought about by the co-operation of an incompetent judge is liable to be annulled; and the parties may have it reversed by the higher jurisdiction on the plea of nullity. A judge should *ex officio* refrain from exercising the judicial office in a cause for which he is naturally or legally disqualified. If he do not, the parties have the right, which they can assert at any stage of the proceeding, to demand his exclusion by a declinatory exception *de judice inhabili.*

26. Every person who appears as judge in a criminal proceeding against ecclesiastics must prove that he possesses the requisite natural and legal qualifications for the office. This he does either by showing that he holds such an office or position, etc., to which ordinary jurisdiction over the defendant or the present cause is annexed, or by exhibiting his written delegation. That he will, moreover, be a just and impartial judge is presumed on the strength of the testimony implied in his appointment to the respective office, or in his commission. Besides, there is his oath of office. An unrighteous judge who warps the law makes himself criminally responsible; but against a violation of the law through his ignorance there is a remedy in the appeal or writ of error.

27. The decision, i.e. the passing of sentence in disciplinary and criminal proceedings against ecclesiastics, as the very pith of jurisdiction, appertains in the first instance to the bishop. The bishop may, if he so chooses, always pronounce judgment himself; but he may also either expressly or, as far as allowed by law, even tacitly intrust it to his vicar-general;[1] or he may appoint a special judge with such full power for all criminal cases (official); or he may create a more or less numerous college of judges as a court of final sentence. Again, this right of passing sentence the Ordinary may commit to others

[1] Instr. *Cum Magnop.*, art. 34.

without any restrictions at all, or he may qualify it in such a manner that the sentence, together with the reasons for it, as also the whole proceedings, shall be first submitted to him before being given in court, to the effect that a sentence not previously submitted to him and by him confirmed shall be void. In the last case those judges appear only as assistants, assessors, councillors of the episcopal court, with only a consultative voice;[1] whereas in the former they are judges proper with decisive vote. Again, in a college of judges (associate court) the decisive vote may belong to the presiding officer (the chief justice) alone, the vicar-general, official, or whatever he be called, while the rest act only as his advisers; or, on the contrary, the presiding judge has a casting vote in case of a tie only, whilst his associates alone have the right of decision.

In some courts, for instance at Prague, as many priests as there are assessors in the court are summoned by the bishop for the final proceedings, and, although they are not *jurisconsulti*, obtain decisive vote. These priests are chosen by him from a certain number previously appointed from among the diocesan clergy. They are a kind of ecclesiastical jury. Besides these, others learned in Canon law may by the bishop be called to the proceedings, but only with a consultative voice. The Holy See even permitted the Bishop of Bertinoro, on account of very particular circumstances, to organize his criminal court with the vicar-general, two of the most learned clergymen from his own and the neighboring dioceses, and two lay lawyers

[1] Such, indeed, is the case with the *Commissio Investigationis* introduced in our American ecclesiastical law by the *Instr S. C. de Prop. F.*, 20 July 1878. These commissioners are called *consilium judiciale, consiliarii;* they help the bishop *tanquam assessores;* their vote is *semper consultivum*, while the final sentence is reserved exclusively (*unice*) to the bishop. See the Instruction *infra* in Appendix; the same with the later explanations in *Appendice* C. Pl. B. III., pp. 292 ff. Cfr. *Smith*, n. 907

(*deux jurisconsultes laiques*); these laymen were to have a consultative vote; a decisive vote only in case that the two clerical assessors should differ in their opinion from that of the vicar-general.[1]

Art. II. The Auditor or Judge of Inquiry.[2]

28. Trial and sentence constitute the regular business of a criminal court. By trial or inquiry, however, we are

[1] S. C. Imm., 12 Dec. 1832. AJP., XIII. 52, 125.—We have kept this paragraph in the present edition, not because we think that the norms and customs therein stated should all be introduced in America, but only for the historical and legal consideration they deserve. Nor are we prepared to assert positively that our bishops may choose assessors or councillors to advise them in a trial coming before their court, as the instruction *Cum Magnop.* is absolutely silent on the point. Still we can see no other reason why they could or should not do so. It would rather seem to be in keeping with the spirit of the *Instructio*, 1878. In fact, all the episcopal courts in Italy, Austria, and Germany have their assessors and councillors, generally to the number of four, following the example of the Roman States. Cfr. the circulars of the Papal Secretary of State, 1831, 1832 (ap. *De Montault*, l. c.), and that of the S. C. Epp., 1 Aug. 1851 (ap. *Acta S. S.*, XV. 547).

As to the question how far the Church allows laymen to take part in canonical *criminal* procedure against clerics, the *circular* sent by the S. C. Imm. to the Ordinaries of the Pontifical States, 3 Oct. 1832, begins with these very words: "It is a principle established by law and constantly applied in practice that neither laymen nor married clerics can act as judges in criminal cases of clerics, nor can they exercise over them any jurisdictional act whatever, even if that jurisdiction had been delegated to them by a competent judge. The reason is that such delegation must fall on a subject capable of ecclesiastical jurisdiction; but of that laymen as well as married clerics are incapable, except in case of a strictly formal indult by the Apostolic See." In a letter to the Archbp. of Bologna, 4 Aug. 1832, the same S. Congr. says that in this matter "custom, however old we suppose it to be, were it even immemorial, can never become lawful and derogate canonical rules." Many like decisions, see apud *De Montault*, pp. 430 ff., 467 ff.; the above circular ap. *Acta S. S.*, XV. 540.

[2] We retain the term *auditor* ("audire partes") in the meaning which it has in Canon law, and which is quite different from that in Common law. An office very similar to that of the auditor in the ecclesiastical court is

not to understand only a logical inquiry, i.e. a scrutiny and sifting of the evidence produced, but moreover in most cases an inquiry or search to collect evidence in order to find the true state of the case and thus arrive at a sentence. To understand this rightly one must keep in view the difference between accusatorial and inquisitorial procedure. In a proceeding by way of accusation the judge of inquiry, if indeed we can here speak of such a one, and the judge who gives sentence are one and the same. In a proceeding by way of inquisition we can not only logically distinguish between the one and the other, but in fact those two judicial acts, the inquiry and the sentence, often do belong to different officials.

The bishop or the vicar-general, if he be the bishop's official, may either personally conduct the investigation, or he may commit it to some upright and capable cleric, who thus becomes the auditor of the case and invested with all the rights and powers necessary to inquire into the whole issue. It is, however, advisable that in more dif-

that of the referee (*referendarius*) in some civil courts. The auditor's duties are perhaps more clearly indicated by the phrase "Judge of Inquiry," which corresponds to the French "Juge d'Instruction" (*Stremler*, p. 159), the Italian "Giudice Istruttore," and the German "Untersuchungsrichter." *Rota*, n. 614, calls him "judex inquirens," and "judex instructor" (cfr. *Instr.*, art. 11, "processus instruitur;" art. 29, "actorum instructor"). Why these auditors, although not appointed to decide the cases, but only to examine and report, were yet from olden times called "judges," is very interestingly told in the *Irish Eccl. Record*, iii. p. 356 ff., iv. p. 379 ff.—It may be well to call attention at once that the *Instructio* speaks of two distinct inquiries. The first is the *summaria facti cognitio* (art. 5), also called *inquisitio pro notitia curiae*, and is extrajudicial. See below, n. 87. 99. The other is a judicial inquiry, being the beginning of the strictly judicial procedure. It is called *processus informativus* or also *inquisitio pro informando judice* or simply *processus*, art. 10 ff. See below, n. 100. *Bouix*, ii. p. 153, calls the first *informatio de fama*, the other *inf. de probatione*. The second inquiry is conducted by the auditor. To it refer the arts 10–29 *Instr.*, the last four referring also to the pleading or the *contestatio delicti*. Cfr. *C. Pl. B. III.*, n. 308.

ficult and important cases the bishop or vicar-general should personally conduct the inquiry.

The Instruction, art. 12, says: "*Processus confectio committi potest alicui probo atque idoneo Ecclesiastico adstante Actuario.*" This does not only mean that the bishop may, *ad hoc*, appoint an auditor, but seems moreover to suggest the idea how wise it would be to charge different judges with the inquiry and with the decision. We find the same thought in the regulations for ecclesiastical criminal courts in the Papal States, 5 Nov. 1831, according to which the vicar-general himself, although he did personally conduct the inquiry, may afterwards preside over his associate judges; but another judge could not preside if he had been auditor in the case.[1]

The auditor's duty is to collect all possible evidence bearing on the case, not only that which may convict the accused, but also that by which he may be exonerated from the charge (art. 11). He should be especially anxious to obtain evidence of the latter kind when it is of such a nature that if not procured at once it may become unavailable by delay.[2]

At the investigation the auditor may proceed *summarily*, that is, he need observe only the essential rules of justice so that guilt or innocence be clearly proved. It is, however, impossible to give definite and minute rules for the mode of proceeding applicable in all cases. The auditor will materially depend on the actual circumstances of the case. Where positive rules are wanting, counsel and common-sense must be the auditor's guides.

[1] S. C. Epp., June 18, 1855. AJP., XIII. 52, 126; XX. 163.

[2] What the *C. Pl. B. III.* says of the auditor in matrimonial cases, n. 305, II., applies to him also in criminal proceedings: "*Auditoris seu moderatoris est tribunal convocare, partes et testes citare, ordinare investigationes, viros peritos ad eas instituendas deputare, edere decreta pro recta actorum compilatione; uno verbo, omnia praestare tam in disquisitione praevia quam in processu probatorio, quæ judicis propria sunt.*"

The auditor must have the assistance of a secretary or clerk to write the minutes (art. 12). Both must take the oath of office.[1]

The auditor is, from the nature of his office, much exposed to the danger of becoming prejudiced. Consider his position: unprejudiced he enters upon the inquiry; convincing proofs of the guilt or innocence of the accused do not immediately appear; some indications, however, do. Quite unconsciously he forms an opinion beforehand as to the guilt or innocence of the accused. It is a prejudice. He examines further; the preconceived opinion may change, but it may also fix itself more firmly on his mind, and often is very strongly settled there even before the inquiry is closed. In such a case there is no other course left than to strictly follow the legal rules of evidence. It is only thus that any prejudice may be set aside and the inquiry be conducted impartially.[2] How differently with the judge who has to give the final decision! He is presented not with a mere *ex parte* statement, but with all the evidence at once—a great assurance of his impartiality.

29. The auditor, provided the vicar-general as such do not investigate, is only a judge delegate; hence an appeal to the bishop against his proceedings is admissible. Yet in causes against clerics the auditor must necessarily be

[1] Instr. *Cum Magnop.*, art. 18.—The *actorum redactor* or *instructor* (il compilatore degli atti) in art. 29 is not the secretary, but the auditor himself. Such is the rule with the S. C. Epp. "C'est le juge rapporteur, et non pas le secrétaire, qui fait l'abrégé du procès qui doit être livré à l'accusé ou à son défenseur, pour servir de base à la défense. C'est aussi le juge rapporteur qui fait relation de la cause à la Congrégation des Cardinaux." (Stremler, p. 608.)

[2] Rightly say the *Acta S. S.*, XV. p. 385, of the auditor: "*Cuique patet quanti faciendum sit ut illi, quibus tam magni momenti opus committitur ut de aliorum actionibus inquirant, non modo doctrinae sed et probitatis, integritatis sanctaeque vitae fama ceteris praecellant.*"

himself a cleric, as stated above (n. 24), although he is only a delegate and has no right to pass sentence. This rule of Canon law cannot be abrogated by any custom be it ever so old. To a question proposed to the S. C. Imm., 18th June 1851, *An episcopus ad conficiendum processum possit delegare usque ad sententiam inclusive judicem laicum?* the answer was given, *Episcopum non posse delegare judicem laicum.* In 1775 it decided in a case where a tonsured but married chancellor had conducted part of the inquiry, "*Constare de nullitate processuum et ministri curiae episcopalis consulant conscientiae suae.*" The same decision was given again the 24th Oct. 1781, 30th June 1732,[1] 5th March 1855.[2] This principle is confirmed in the *Instr.*, art. 12. A chancellor, if he should happen to be a layman, could not even judicially investigate whether an order of the court have been complied with or not.[3] The Pope alone could by special indult admit laymen as auditors. But the laic also has to conduct the criminal inquiry according to the rules of Canon law. Should he, however, without violating any substantial forms rather proceed according to civil law, the judge proper and the appellate courts would not thereby be bound to do the same.[4]

The inquiry is to be conducted by a single auditor, as it is only in order to collect the material.[5] A whole college of auditors if they would have to act *collegialiter* would be exceedingly slow and embarrassed, and therefore useless.

[1] AJP., XIII. 45, 46. 51.

[2] AJP., XIII. 972, 1043, XX. 163. XXI.

[3] 25 Sept. 1806. AJP., XII. 853, 756. Concerning lay officials in general see *supra*, p. 52, note 1.

[4] 7 Dec. 1855. AJP., XX. 162. XIX.

[5] This is no doubt correct, as a rule, and in particular with regard to the *Instructio*. But as a matter of fact judicial cases, where the work of collecting all subject-matter for the court proper was intrusted to a committee of auditors, are not unknown in the history of canonical procedure. In recent times we have had the *Commissio Investigationis*.

Art. III. The Chancellor, Secretary, Clerk.

30. Innocent III. ordained at the fourth Lateran Council that in the inquisitorial procedure introduced by him, and afterwards so famous, all judicial acts should be recorded in writing. He says: "As the innocent litigant is sometimes unable to prove the truth of his denial of the false accusation by an unjust judge (for the mere fact of a denial is in the nature of things not yet a direct proof), hence, that falsehood may not triumph over truth nor iniquity prevail against right, we ordain that in the ordinary as well as extraordinary trial the judge shall always employ either an official person, if possible, or two fit men, who shall faithfully write down all the acts of the trial, viz., citations and terms, recusations and exceptions, petitions and rejoinders, interrogatories and admissions, the depositions of witnesses and documents put forth, interlocutory and final appeals, renunciations and conclusions, and whatever else may occur. All this they shall write down in proper order, indicating places, times, and persons. And all that has thus been written shall be given to the parties, so, however, that the originals shall be kept by the writers, in order that by these, if any quarrel as to the judge's proceeding should arise, the truth may be shown. By this means the honor of honest and prudent judges will be upheld, while at the same time the just right of innocent persons shall not be injured by an imprudent and unrighteous judge."[1] This ordinance is in full force to this day.[2] It was the more necessary in the beginning, since in a purely inquisitorial proceeding the accused would otherwise be confronted with the judge alone. The official appointed for this purpose is called, from his

[1] c. 11, X. II. 19.

[2] S. C. Imm., 3 March 1694; 7 July 1699.

writing the acts and documents, *Actuary* or *Clerk*[1] of the court; from his abridged style of writing, *Notary;* from his advancing to the chancel in reading his papers, *Chancellor;* and in many localities, from the place of his employment, *Secretary.*[2]

[1] From *clericus*, as in most countries only the clergy were able to read and write, and clerics of the minor orders were then commonly employed as notaries.

[2] No one who has had to deal largely with Roman documents and decisions, or to read up old or modern writers on ecclesiastical law and discipline, can be unaware of the most confoundedly confused way of using those different terms. At one time you are certain they all mean the same, at another you are as certain that a *notarius* is not a *secretarius*, and a noble *cancellarius* by no means a simple *actuarius*. It seems to us that, although now these terms are mostly used quite indiscriminately, they had each, according to Canon law, a distinct meaning. A *notary* is an officer holding a permanent commission to the effect that all documents, public or private, signed under his own hand and executed in proper form are true instruments in law and valid proof in court. Of this officer commentators generally speak in the preliminary observations on tit. 22, *de fide instrumentorum*, l. II. By Canon law every bishop has the power to create notaries, and although not recognized by our civil courts, their signature would have to be admitted as evidence by every ecclesiastical court. The *Chancellor* has charge of the chancery or Archives, i.e. the place where the records, charters, evidences, or any important documents are kept (Archivist, Registrar. Cfr. *Reiffenstuel*, de fide Archivii, l. II. tit. 22, n. 102 ff.). He was not necessarily a notary, although custom, supported by very good reasons, soon combined the two offices in one. We have had instances here in the United States where bishops had their chancellors made notaries public by the civil authority. A practical move, we think. The *Actuary* was a clerk employed to write down the *acta* of any official and judicial proceedings, to make out the reports, briefs and abstracts, etc. In course of time he was also called *Secretary*, as one of his sworn duties was to keep the transactions themselves as well as the report or minutes thereof secret.

One can easily understand how these distinct offices might be filled by the same person, and that in consequence the different titles lost their distinct meaning and came to be used indiscriminately.

On the history of these offices (notary, secretary) see the interesting chapters (105. 106) of *Thomassin*, Vetus Eccl. Discipl. p. I. l. 2; *Van Espen*, p III. tit. 6. c. 4. In regard to the law cfr. *Ferraris*, sub *vv.*

The *Instructio* uses both terms Actuary (art. 12) and Chancellor (arts. 8, 34).[1] It expressly requires the presence of the chancellor as well at the examination (art. 8) as at the final proceedings (art. 34), and that of the secretary at the inquest (art. 12). The chancellor may also officiate as notary in all transactions of the so-called voluntary jurisdiction.[2] Although Innocent III. ordained that ecclesiastics should not be employed as clerks of the court,[3] yet the Roman Curia itself very often departed from this rule, and clerics are up to this day employed as clerks. Notwithstanding this universal practice, it is even now allowable to employ laymen.[4]

For the edification of all whom it may concern we append his remark: *Secretarius qui multa scribit probabilius non excusatur a jejunio. Potest enim secretarius vires habere sufficientes ad multum scribendum, quamvis jejunet. Immo temperantia et jejunium maxime conducit ad valetudinem sedentarii.* Thanks, good old Ferraris !

[1] The *Acta S. S.*, xv. p. 386, maintain that by *actuarius* and *cancellarius* the Instruction means the same person. Not necessarily. That in art. 8 and 34 it is the chancellor of the diocese (not the bishop's private secretary, except he be specially commissioned) who is referred to, we have no doubt. Art. 8 treats of an extrajudicial proceeding, while art. 34 refers to the public and final hearing of the case. But art. 12 speaks of the special inquest to be made by the auditor, a proceeding wherewith the court proper has nothing to do till it be finished and the *procès verbal* (art. 29) handed over to the judge. For this special work the auditor may choose his own clerk or actuary, if so the judge (bishop or vicar-general) allow. Cfr. *Rota*, n. 654. When the *C. Pl. B. III.*, n. 311, adopts the opinion of the *Acta S. S.*, we consider it to be a directive norm at most.

[2] S. C. Epp., 11 Feb. 1806. AJP., XII. 850, 750.

[3] S. C. Epp., 14 July 1772. AJP., XII. 118, 555.

[4] S. C. Imm., 30 June 1832. AJP., XIII. 46, 58. This answer refers to a particular case of necessity. The very next month (July) the Archbishop of Bologna asked for the same indult again, because in his whole clergy he could not find two fit subjects for the offices of auditor and notary in his criminal court. The request was granted *durantibus circumstantiis*, and in regard to the clerk with the clause: *dummodo se abstineat a subscribendis examinibus et a quocumque exercitio jurisdictionis.* Ap. *De Montault*, p. 471. The S. Congr. has always been very careful to

The notary, however, especially if a layman, has to make out the acts of the proceedings only materially; that is, simply to write whatever he is ordered to, either by the law or the judge. He is not allowed, either directly or indirectly, to conduct even a part of the trial; if he should, for instance, in the absence of the judge-auditor, merely attempt to examine witnesses, the whole proceeding based thereon would be void.[1]

31*. We omit a passage by the author on the payment to be given to the clerk. Custom or statute must regulate that with us. But we add a few remarks that seem to apply to the clerk of our ecclesiastical courts, whether they call him notary, chancellor, or secretary. *Reiffenstuel*, l. II. tit. 22, observes that the notary, when writing out an instrument, must write down nothing else but what he has seen with his own eyes and has himself heard (n. 27);[2] that he should always use the same signature, so that, if necessary, it may be authenticated by comparing his signature in other documents (n. 31). *Schmalzgruber*, ibid., says the notary should know something about law, although he need not be a *Doctor in law*. He should at least know all that his office demands, and how to draw up the different instruments in proper form (n. 5); in writing out the record from his minutes he ought to write the words in full without contractions or abbreviations; numbers he should write clearly and distinctly, so that they cannot be changed (n. 12); and, in general, he must carefully note places, times, and persons (13, 14). We also call attention to the nice discussion on the relative value of the clerk's private

distinguish between civil and criminal cases of clerics, and in the latter to uphold the principle of absolute *immunity*.

[1] S. C. Epp., 25 Sept. 1806. AJP., XIII. 46, 61.

[2] "Caveat actuarius ne in scribendo abundet in sensu suo; hoc enim esset et flagitiosum et ruinae plenum."—*Rota*.

notes (*minutae*, *protocollum*) and the official record or document made out from them (*instrumentum*), apud *Reiffenstuel*, l. c., n. 34 ff.

Is the secretary in our criminal trial bound to observe the so-called *solemnitates instrumentorum*, i.e. certain formalities by which alone his documents or records become official (*publica*)? The *Instructio* mentions only the subscription to the act in the extrajudicial precept (art. 8), but nothing concerning the acts belonging to the judicial trial. But the C. Pl. B. III., n. 314, demands that not only the accused, but the judge also and the clerk sign the depositions of defendant. The same ought to be observed with the depositions of the witnesses,[1] as required by the Instruction on matrimonial causes, § 14. It would be advisable also for the clerk to observe *the noting* (*præsentatum*), that is, to note on every notice, letter, or document offered to the court the exact date when, and the name by whom, it was presented; moreover, if not his own full name, at least his initials. Again, it is well to date every one of his minutes or notes, not only the record he may afterwards write out. Official copies of the minutes or of the report must be certified by the secretary's signature.[2]

Art. IV. The Apparitor.

32*. The Apparitor, so called in the English ecclesiastical law, is an officer who appears to others that they may appear in court. He is the official messenger (constable) to carry the summons to those whom the judge cites to appear during the trial. He also carries the written sentence to the offender or his advocate that he may, if so he intend, lodge an appeal before the judge.

[1] S. C. Epp., 24 July 1832. *Pierantonelli*, p. 40.
[2] S. C. Epp., 27 July 1759. AJP., XIII. 51, 111.

Canon law supposes the apparitor to be a regular attendant and duly sworn officer of the court, so that his affirming of having properly served the summons is evidence in law. *Schmalzgruber*, l. II. tit. 3, n. 25, 2°, 7°.

Our ecclesiastical courts in the United States have no such officers. The same appears to be the case in other countries; for the *Instructio*, art. 14, provides that in such case necessary writs and notices may be served either by a qualified person who shall afterwards certify to the fact; or through the mails by registered letters, when the receipt returned will be evidence that the summons has been served. Cfr. also *Instr.* 1878, art. 4.

The *Acta S. S.*, XV., pp. 387, 550, seem to imply that the sentence should, as a rule, be served on the offender or his advocate by an apparitor, and by mail only then when it cannot possibly be done by a person.

The apparitor, evidently, may be a layman.[1] Of these messengers (*apparitores*, *cursores*, *pedelli*) commentators generally speak under tit. 3, *de libelli oblatione* (*citatione*), l. II. Cfr. *Smith*, n. 926.

CHAPTER II.

THE PARTIES.

Art I. The Prosecution.

1. The Fiscal Procurator.[2]

33. It is in the nature of things and a rule of ancient law that the same person cannot be accuser and judge in

[1] S. C. Epp., 9 Feb. 1710. AJP., XIII. 44, 41.

[2] This office is unknown to the Decretals and their commentators. Being of later origin, its history, nature, and duties must be learned from more recent writers. Cfr. *Van Espen*, p. III. tit. 6, c. 5. *Bouix* I. 470 ff.

the same cause. In the purely inquisitorial procedure, where the accused is to be examined only, the judge, indeed, has more or less to sustain the part of a prosecutor, though Innocent III. himself guards against any such view of his new ordinance [1] by making the rumor (*fama*) of the crime committed play the part of the accuser. Very soon, therefore, did a third person slip into the courts even of that time, either in a private or a public capacity to begin and carry on the prosecution. To distinguish this proceeding from that by mere inquiry, it was called *inquisitio quae fit aliquo promovente ipsam*.[2]

This new arrangement, however, being contrary to the very nature of mere inquisition, was not carried any further in Canon law.[3] But the secular courts took hold of it and made a most ample use thereof, particularly in England, France, and Italy; and the institution became

Craisson, n. 5767 ff. *Smith*, n. 912 ff. We retain the term "fiscal procurator" as more ecclesiastical than "public prosecutor." It is still used in Scotch and French law. For the etymology of the term consult the writers referred to

[1] c. 31, X., v. 3: *non tanquam sit idem ipse accusator et judex, sed quasi fama deferente vel denunciante clamore sui officii debitum exequatur* (*praelatus*), etc.

[2] Hence the public or *fiscal promoter*. Cfr. *Prompsault*, s. v. *Promoteurs des officialités*. Promoter is used in a very different sense in American law, meaning a person engaged in establishing a joint-stock corporation. *Bouvier*, s. v.

[3] This assertion seems too general and can only mean that the public prosecutor or promoter did not then at once become a regular and permanent office of the ecclesiastical judicature, but only long after it had become such in the civil courts. It would hardly be correct to say that ecclesiastical prosecutors (promoters) in some particular cases did not appear very soon after the new procedure introduced by the great Innocent III. At least they seem to be mentioned by later commentators and practitioners of the thirteenth century; and a famous canonist of the fifteenth century, speaking of *ecclesiastical* public officers, sweetly remarks: *dici non potest quanta mala ubique faciant illi scelerati exploratores criminum, quos* promotores *appellant*. They are moreover mentioned in the decrees of the councils of Constance and Basel.

very famous at the beginning of this century, especially in France, where the *State Procurator* is chiefly guardian of the law, and therefore takes part as well in civil as in criminal proceedings; he may even in a civil proceeding, where the law appears to him as having been injured, take an appeal independently of, and against, the will of the parties. This public procurator has at different times and in various countries borne the name of *Procurator regis*, *Procurator fiscalis*, *Promotor fiscalis*, or, in short, *Fiscalis*.[1] Later on, when the office of fiscal procurator in the secular courts had been fully developed and had proved successful, most ecclesiastical courts, following the views of the times, adopted it for the trial of criminal causes.

34. The *Instructio* does not leave it to the bishop whether or not he will have a fiscal procurator for his criminal courts, but it says expressly: *Unicuique Curiae opus est procuratore fiscali pro justitiae et legis tutela* (art. 13).[2] Articles 33, 34, 35, of the same instruction make it evident that the fiscal procurator has to officiate as public prosecutor. By this new regulation[3] the Church has abandoned the purely inquisitorial procedure and again approached the accusatorial one. For as soon as the delinquent is confronted with the fiscal procurator, he appears as defendant, and consequently as a party with more or less rights. The fiscal procurator and his duties in canonical criminal procedure cannot be replaced by any other officer. Thus it would be of no consequence if a cleric, e.g. a rural dean, should make a formal accusa-

[1] In America this officer is called *Attorney-General*; in England also *Solicitor-General*.

[2] *Acta S. S.*, XV. p. 386: *Verum non in judiciis tantum quae ex officio instituuntur sed in omnibus judiciis ejus praesentia est.*

[3] The *Instructio* appears to be the first *positive statute* in Canon law by which the office of the fiscal procurator, introduced only by *custom*, is made a regular and permanent institution and probably destined to become general in the whole Church.

tion before the bishop, leaving the fiscal procurator aside, nor would it matter at all that the bill of complaint was as correctly and perfectly drawn up as the law could require.[1] Again, the secretary, chancellor, or clerk of the court cannot at the same time discharge the duties of the fiscal procurator.[2] Though it seems but proper that the bishop should appoint an ecclesiastic to this office, yet he may also authorize a layman, because the procurator after all does not exercise any properly so-called jurisdiction.[3]

The fiscal procurator is an officer of the bishop. In committing an offence the delinquent has made himself amenable to the Church, whose duty it is to correct and punish whenever necessary. But the Church is represented by the bishop, who, therefore, becomes the party seeking correction and satisfaction, i.e. the complainant against the accused, who is respondent and defendant. Yet, as the bishop himself is also to sit in judgment against the accused, he transfers his right of action or prosecution to the fiscal procurator, and that for two reasons: first, in the interest of justice (*pro justitiae ac legis tutela*); secondly, that he may not even to mere outward appearance act as judge in his own cause. The procurator is,

[1] S. C. Epp., Dec. 1785. AJP., XIII. 44, 34. We take this to mean that no matter how correct and formal the charge may be, the bishop cannot thereupon begin a formal suit or trial without his fiscal procurator taking the initiative.

[2] S. C. Epp., April 1727. AJP., XIII. 44, 33.

[3] S. C. Epp., 2 July 1677. S. C. Imm., 30 June 1832. AJP., XIII. 44, 31. 32. There is no doubt that modern writers suppose the fiscal procurator to be a cleric, at least in criminal cases against clerics. Thus *Rota*, n. 652, says: *Est autum procurator fiscalis vir ecclesiasticus*, etc.; and referring to the statute of St. Charles Borromeo: *Sit unus promotor fisci, clericus et juris utriusque doctor*, while not objecting to the *clericus*, he explains the J. U. D. by saying that *quantum fieri potest, fiscalis promotor sit in jure doctus et peritus.* The same is implied when the third plenary Council of Baltimore, n. 300, admonishes him: *Sit quidem nunquam immemor se contra* fratrem *causam agere.* Cfr. *supra*, note 1, n. 27.

therefore, bound to his general or particular commission received from the bishop, whilst the bishop as judge is bound only to the law. This follows necessarily from the fact that the *Instructio* embodies two postulates of the administration of criminal law. One is the principle of legality demanding that the rights of the law shall be upheld and therefore strictly executed; the other is the principle of expediency, demanding that the public welfare should take precedence over the law where its execution would be injurious to society. According to the first, it is the duty of the bishop to prosecute and to punish his ecclesiastics for every transgression threatened by the law with punishment, as also to correct their evil ways (art. 1). According to the second (art. 3), the bishop has often to consider in a particular case what may conduce more to the salvation of souls and the welfare of the Church, to prosecute the criminal or not. Higher interests and considerations will sometimes make it very advisable and even necessary not to institute a criminal proceeding. There are, moreover, in ecclesiastical as in civil law delicts as to which it depends upon the will of a third person whether or not they are to be prosecuted. This third party will probably not desire it if thereby he would receive more injury than satisfaction. Christian charity in such cases forbids the bishop to proceed against the criminal, because a great good which that third person cannot and will not sacrifice would thereby be lost. For instance, a cleric has been intimate with a hitherto blameless maiden of marriageable age; the crime has as yet been kept secret, although the proofs are positive; the girl, however, protests against any judicial proceeding lest she herself fall into bad repute. A criminal proceeding in such a case would be extremely illegal and unchristian.[1]

[1] S. C. Epp., 23 Mch. 1748. AJP., XI. 1125, 437. Cfr. on this point *Rota*, n. 490 ff.; *Stremler*, p. 154.

That such considerations require great pastoral wisdom and cannot be wholly left to the procurator, is evident. The bishop must be solicitous himself about such causes of his clergy.

The fiscal procurator having obtained sufficient information must apply at the episcopal court for an investigation of the offences of clerics that have come to his knowledge through notification or otherwise.[1] Should the fiscal upon a general or special episcopal order bring a public action, he must make his motion to that effect in writing in the episcopal criminal court, and in his bill of complaint must state the name of the accused, the crime, the evidence, and the names of the witnesses, accomplices, etc. He must hand in the bill of complaint at the episcopal chancery, where the chancellor will affix thereto the *praesentatum;* all the rest will for the present be left to the court.[2] After the investigation has been completed and the court has determined upon the further prosecution of the cause, he cannot change his motions any more, particularly if the accused have already brought in his defence.[3] If the defensive proceedings should prove the materials obtained in the investigation to be insufficient for conviction, a new inquiry can be ordered only by the court.[4]

The fiscal procurator has generally the exclusive right of accusation. This appears at first to be a doubtful matter, for it involves the duty of the procurator actually to make the accusation whenever necessary, a duty which he may easily neglect, particularly when it might be of interest to himself not to bring the suit. But it must be remembered that he is an officer of the bishop and must

[1] AJP., XIII. 44, 29.
[2] AJP., XIV. 971, 35.
[3] S. C. Epp., 30 June 1826. AJP., XIII. 44, 37, 39.
[4] S. C. Epp., 30 June 1826. AJP., XII. 1017, 860, XIII. 44, 38.

bring the charge whenever the bishop orders him to do so; that, moreover, he may be deprived of his office at any moment should he in any manner show neglect or mismanagement of the affairs of his office.

35*. To the objection that such a public prosecutor might be over-zealous in making charges against clerics a like answer may be given; viz. that he cannot bring a judicial charge without being ordered by the bishop, who must examine first whether there be sufficient cause for it.[1] This officer, besides, must never forget that even while discharging his duty of prosecutor he is to serve the law as well as justice, and that consequently he is bound to respect the rights of the accused, and not to press his charges beyond the bounds of equity, nor use means contrary to truth or justice. Nay, we do not hesitate to affirm that he must notify the auditor of any evidence favorable to defendant, which he may perchance have found in his endeavors to get proof for the prosecution.

The author spoke above (n. 16) of a general mandate by which the bishop appoints his vicar-general as *judex ordinarius* (official) for all clerical causes. In the foregoing section the author mentions a general mandate given to the fiscal procurator to prosecute criminal cases. In a later paragraph he deals with the conflict that might in some case eventually arise between the official and the procurator. We omit the paragraph in our edition, as in that event there is but one very simple remedy, viz. recourse to the bishop, who must decide the question. But we desire to call attention to a point which to us seems doubtful. The fiscal procurator, who is always appointed by letters-patent, needs no *written* commission for special cases if he has a general mandate. In

[1] "Quod si Episcopus faciendum esse judicaverit, procurator fiscalis ab eo accipit mandatum causam agendi et processum promovendi." *C. Pl. B. III.*, n. 301.

that case the bishop or official will merely give notice that there is a case for prosecution, and the prosecutor will at once draw up the formal charge and demand that judicial investigation or inquiry be made. But does the general mandate imply that he must thus officially proceed even when he is not so notified by the judge, but because he knows of a case through private information or rumor or private denunciation? Our author clearly thinks so, others apparently. Again, if it be answered in the affirmative, is the fiscal not only allowed but bound to institute the *summaria facti cognitio* (art. 5) even without the bishop's notice or request, simply in virtue of the general mandate? If we presume to state our private opinion, we may be pardoned on the plea that these things with us in the United States are still *in fieri*, not *in facto esse;* hence the more uncertainty is removed from the very start, the better. Whatever may have been or still be the custom in Europe, we believe, judging by the general tenor of our last plenary Council (n. 308 ff.) and of the *Instructio* itself, that the fiscal procurator should not make a formal charge in any case before he has been notified to the effect or requested by the Ordinary. Again, we think he should not on his own account and without the bishop's explicit consent undertake any extrajudicial or private special inquiries;[1] otherwise he would certainly be liable to be considered too officious by most of our American clergy. However, as no general law prevents the bishop from granting even such full and one might say illimited power to his fiscal procurator, all doubt will be removed if the bishop does fully, minutely, and explicitly state in the letters-patent what rights and duties the procurator shall have. Then let the procurator abide by his commission.

[1] *Van Espen* (l. c., tit. 8, c. 1, n. 37) speaking of Belgium says that this rule is *passim ubique receptum.*

2. Other Plaintiffs.

36. Under the new law of the *Instructio* every person has a right to present a complaint or make an accusation which may lead to criminal proceedings against an ecclesiastic. No particular qualifications on the part of such complainants are required, nor may they be confounded with the accusers in the old accusatory proceeding. The Instruction on episcopal courts in the Archdiocese of Prague says on this point: "All irreproachable priests, nay, all members of the Catholic Church, against whom no suspicion of malicious deformation can be brought, may give notice of criminal cases to the court. But the court will pay no attention to anonymous notices or to notices that are sent by unknown persons without giving the place of their residence."

(*) In the former proceedings by way of accusation or denunciation not every one was qualified to make the judicial complaint. Commentators (in l. V. tit. 1) generally put down the rule that all those are qualified who are not disqualified by the law. As grounds of such legal disqualification are named the sex, defect of age, infamy, reverence and the tie of blood, hatred and revenge, etc. However, in case of an atrocious crime every one was qualified to complain. That at present such disqualifications are no longer to be considered is clear from the fact that the *Instructio* admits only the inquisitorial proceeding called *ex officio*. But, as we shall see later, it is the characteristic note of this proceeding that the bishop cannot enter upon it before he has by a strict inquiry satisfied himself (*plena vel semplena probatione*) that there is sufficient cause for it. Any complaint or charge or information against a cleric may open the way to such inquiry, but not directly to the trial as in other proceedings. (*Rota*, n. 648 ff.) No account should be taken of any

accusation made either by word of mouth only or by anonymous or imperfect (without place or date or name or residence) letters, or in mere general terms. (*Rota*, n. 419.)

Art. II. The Defence.

1. The Accused.

37*. Whoever is accused of an offence against the laws is entitled by the command of Christian charity and by natural right not to be held guilty, much less to be punished, before the charge has been fully substantiated. If convicted, the criminal still has the further right not to suffer more punishment than the law demands of him according to the nature, the weight and grievousness of the offence. It is as much to protect these rights of the accused as to vindicate the law, that the Church has instituted those legal forms and methods, the rules of procedure, to prove the fact as well as the special nature of an alleged offence.

So strictly does the Church maintain this principle, that should a cleric having committed an offence against her laws freely accuse himself before the bishop and openly confess, the bishop could not pronounce sentence against him. He may act with him as father. To proceed as judge and vindicator of the law, he must first obtain a judicial confession, one made, proved, and judged upon according to legal rules. Not even a canonical admonition may the bishop give to a cleric who is accused, without first obtaining at least a summary information to establish the alleged fact (art. 5). No accused shall be condemned without having had in some way or other his defence. Hence if the accused were willing to waive all defence, or unwilling to engage counsel because he considers the matter too unimportant, or thinks his case evident and defence unnecessary, or believes the decision to go against

him whatever the defence might be, or is too poor to pay counsel's fee, still the *Instructio* commands the bishop to appoint *ex officio* a defensor for the accused (art. 31).[1] Various reasons for this provision are assigned by writers. The main one is to avoid doing injustice to the accused. Another one is that a cleric being one of the Church's chosen members is no longer lord over, or absolute possessor of, his good name and reputation. The Church, for the sake of her faithful children and her own honor, has a right to it. Hence he is not at liberty to give it away; and if he will not defend it himself, the law of the Church appoints another for the purpose.

An intelligent and impartial student of the Commentators on the second book of the Decretals will be delightfully astonished to see how wisely the great legislators of the Church combined in the work of canonical procedure all the thousand different elements by which man may prove the truth (*quibus veritas vere demonstrata elucescat;* art. 16); thus to maintain on the one hand the majesty of the law (*legis tutela*), and on the other the native rights of the defendant (*justitiae tutela*).

38. According to the law now in force it is the duty of the accused, upon being summoned, to present himself before the judge for examination and defence (art. 21, 25). *The citation*[2] is essential to the whole proceeding; to omit the former will render the latter void.[3] Not even a censure previously threatened may be inflicted without summoning delinquent "*ad dicendam causam quare.*"[4]

According to the *Instr.*, arts. 22, 23, it is not absolutely necessary to specify the particulars of the charge in the

[1] S. C. Epp., 30 May 1823. AJP., XX. 90, XLII. 11 May 1844. AJP., XVII. 444, 1718.

[2] Commentators in l. II. tit. 3. *Pierant.*, tit. 5. n. 6 ff. *Rota*, n. 620 ff.

[3] S. C. Epp., 22 Sept. 1741. AJP., XIII. 47, 78, 79.

[4] S. C. Epp., 29 Sept. 1761. AJP., XI. 1094, 376.

citation. Whether this be advisable or not in a particular case, is left to the prudence and discretion of the judge. He will not mention the specific charge, much less the particulars, if he believe the accused would in consequence not heed the summons or, if innocent, would be carried so far away by indignation as to create disturbance among the people. That omission will not void the proceeding, but merely entitle defendant to a new term for answering the charge after it is made known to him (*Instr.*, art. 28). If the accused does not obey a peremptory summons, the court will proceed against him *in contumaciam* (*Instr.*, art. 24), except he offer good reasons for his non-appearance,[1] when a new term will be granted. In most criminal cases of clerics[2] the accused had better, during the inquiry, withdraw to a religious house,[3] since his influence in public during this time would not, as a rule, be beneficial.[4] The welfare of the Church and the salvation of souls often demand a judicial trial; canonical procedure, although in its very nature something of a public act, cannot always be avoided, for the ecclesiastical authorities are not omniscient. An accused cleric may therefore find himself compelled, by the love of God and of the souls intrusted to him, patiently to stand a criminal trial, however unjustly thrust upon him.

The most ample right of defence is granted to the accused by our *Instruction*, arts. 22, 25, 27 sq., 30 sqq., 36. We call special attention to the confrontation of witnesses implied in arts. 27, 32. The *processus legitimatio*

[1] *Acta S.S.*, xv. 389 sqq.

[2] We omit here as impracticable the author's remarks on the imprisonment of the accused, his release on bail, his relegation or consignment to a certain limited place (county, village, or religious house). Cfr. *Stremler*, p. 62 f

[3] AJP., xiii. 47, 74.

[4] This will depend altogether on the peculiar circumstances of each case.

(the legitimizing of the whole proceeding by observing certain requisites of the law) consists mainly in that confrontation; without it one of the principal means of an effectual defence would be set aside (see *infra*, n. 69). For the final pleading a special defensor is granted to the accused (see *Instr.*, art. 30 sq.).

2. The Advocate or Counsel.

39. The *Instructio*, while granting to the accused the right to conduct the defence himself (art. 27), allows him, if he choose, to employ an advocate or counsel (art. 30).[1] The advocate plays a most important part in the canonical criminal procedure. Not every ecclesiastic has the required knowledge of criminal laws and criminal procedure, and moreover the coolness and deliberation necessary while defending himself.[2] Some, however may possess all that and be fit to undertake the defence of another, i.e. act as advocate.

The accused is not confined to special persons, to professional advocates, in the employment of a defender, but has a free choice even when the bishop has appointed permanent advocates at his court.[3] There are excluded, of course, the judge, the chancellor, and the fiscal procurator; the last, in particular, would become guilty of prevarication should he officiate as counsel for both parties.

(*) According to the *Instructio* (art. 30) the defendant may choose for his advocate an ecclesiastic or a layman, either one to be approved by the bishop.[4] The wording,

[1] The *Instructio* calls him *defensor*. The Decretals call him *advocatus*, *patronus*, and treat of this office in l. 1. tit. 37 *de Postulando*, where the commentators also may be consulted. Cfr. *Van Espen*, l. c., c. 2.; *Craisson*, n. 5642; *Smith*, n. 766.

[2] *Rota*, n. 726 sqq.

[3] S. C. Epp., 3 Jan. 1819. AJP., xx. 457, x.

[4] S. C. Imm., 30 June 1832. AJP., xiii. 51, 118.

however, of this article in the *Cum Magnop.* clearly shows that if an able ecclesiastic can be found to conduct the defence, no laymen should be employed. It seems rather incongruous that before a purely ecclesiastical tribunal and in strictly canonical causes lay advocates or lawyers should be admitted to plead whether for or against a cleric. For wise and pious reasons did the fathers of the third plenary Council of Baltimore, notwithstanding that the Instruction requires the bishop's approval for the advocate, ask of the Holy See not to allow laymen, and enact the statute that the advocate must always be an ecclesiastic. Even a clerical advocate the judge may for good reasons refuse, and request that another one approved by him shall be engaged (n. 302). No mention of laymen whatever is made in the answer (n. IV.) of the S. C. Prop. concerning the defender at the trial before the Committee of Investigation. It only mentions *alium sacerdotem.*

40. The advocate must take the oath that he will conscientiously conduct the defence. Sometimes, as the bishop may deem proper, the oath contains the provision to keep the matter secret (art. 32). If the trial is once begun, the advocate must carry to the end the case he took in hand. In the manner of conducting the defence he is quite independent of the accused. If he should falsely state or admit any facts, the defendant may correct such statements before the final sentence, or afterwards in the appeal. An error in law on the part of the advocate will not be prejudicial to the defence as long as the court do correct it.

(*) In the manner of conducting the defence the advocate must, as the commentators say, observe the laws of propriety and moderation, of truth and of faithfulness (*modestia, veritas, fidelitas*). Hence he must abstain from invectives, arrogant and presumptuous insinuations; effusive verbosity would also be out of place; exceptions

or protests against the ruling of the court should be made in moderate language. Truth is averse to any trickery, sophistry, ambiguous and misleading statements. Although bound to defend his client as much as possible, yet the advocate may not do so *per fas et nefas*. By faithfulness he is bound to conduct the defence to the utmost of his ability, and to avoid conscientiously whatever might injure his cause; also not to betray, nor make improper use of, any secrets confided to him by his client.

The advocate, no doubt, has a right to his fee. We do not know if any special provisions on this point have as yet been made in any of our ecclesiastical courts in the United States. The defendant ought to agree beforehand with counsel as to the fee to be paid whether the cause be won or lost. But who is to pay counsel appointed *ex officio*, the defendant or the bishop? As we have no "clerical bar," it would seem that one could not be commanded by the bishop to give his services *gratis*, and that if appointed *ex officio* he had a right to a fee, to be paid by defendant, if convicted, otherwise by the bishop from the fisc of the diocese (see *infra*, n. 116). What shall be a just fee for the advocate must, according to the commentators, depend on the importance of the case, the amount of work done, the lawyer's skill and ability, and legal custom.

3. The Attorney or Proctor.

41. Canon law does not admit representation of the accused in criminal cases.[1] A reason given by canonists is that the attorney becomes in virtue of his commission *dominus litis*, that is, the case becomes his own personal affair, and sentence will be given upon him personally. Now, this would appear unnatural in case of another's

[1] *Santi*, l. II. tit. 1, n. 19; *De Angelis* I². p. 360.

crime or delict. Hence representation is allowed in civil cases only. Another but somewhat poor reason is sometimes given; viz. that if the accused were represented by attorney and could thus remain away, he might easily escape execution of the sentence by flight. We cannot imagine a single case under our circumstances where this reason would prove anything, speaking as we do of criminal cases of clerics before ecclesiastical courts; nor do we think that a difference can be made in the matter between original and appellate courts. The *Instructio*, art. 30, does not prove the contrary, as *repraesentare* and *defendere* are to be referred conjunctively to the same person, who may, therefore, be called either attorney or advocate. This is evident from the wording of the same article in the *Cum Magnopere*.

The case is quite different with the prosecution. The fiscal procurator may, by permission of the bishop, prosecute through his attorney approved by the bishop, which is evidently nothing else than the appointment of a special prosecutor. Again, the bishop from whose sentence an appeal is made, may defend his part against the appellant by his own fiscal procurator, or depute the metropolitan's procurator as his attorney.[1] The *Promotor fiscalis Generalis* at Rome, an officer appointed by Benedict XIII. in 1724, to represent the bishops in any criminal cases brought to Rome by way of appeal or recourse, is simply the attorney-general for those bishops.

[1] Commentators treat of attorneys whether *in fact* or *at law* under tit. 38, *De Procuratoribus*, l. 1. Decret. Cfr. *Craisson*, n. 5615 ff.; *Smith*, n. 756 ff.

Second Part.

THE CANONICAL PROCEDURE.

SECTION I.

FORMS AND PARTS OF CANONICAL PROCEDURE.

CHAPTER I.

FORMS OF PROCEDURE.

Art. I. Judicial and Extrajudicial.

42. We have already remarked above (n. 3) that the division of punishments into corrective ones, whose direct object is the amendment and reformation of the delinquent, and vindictive ones, whose direct object is mainly the restoration of the disturbed order and retribution, is in most cases rather logical than real. For all punishments effect more or less in the offender a change for the better, except capital punishment which the Church does not inflict precisely because it precludes the future reformation; on the other hand, the least offensive means of correction, a paternal admonition, may, under certain circumstances, appear to delinquent as undeserved castigation. From this it will be seen that a strict division of the procedure into disciplinary, i.e. such as applies corrective or reformatory means, and criminal, i.e. such as imposes a penalty for the committed offence, is not prac-

ticable. The power to impose disciplinary and criminal punishments the Catholic Church, as we remarked in the Introduction, received from her Divine Founder Himself. Upon the occasion of conferring this power He at the same time pointed out, in a manner unsurpassed and as a pattern for all times, the order and course of the disciplinary and criminal procedure: "*Si autem peccaverit in te frater tuus, vade, et corripe eum inter te et ipsum solum: si te audierit, lucratus eris fratrem tuum. Si autem te non audierit, adhibe tecum adhuc unum vel duos, ut in ore duorum vel trium testium stet omne verbum. Quodsi non audierit eos, dic ecclesiae: si autem ecclesiam non audierit, sit tibi sicut ethnicus et publicanus.*" [1] The Master speaks here first of a private reproof, therefore of a secret extrajudicial procedure, then of a reproof before witnesses, therefore of a more public one, and finally, by intimation, of the regular criminal procedure. The Church still retains this division of the canonical procedure against her clergy. In the following pages, therefore, we distinguish between extrajudicial and judicial proceedings, without entering here more fully into the technical designations, significations, and relations developed in Canon law.

43*. To rightly understand what are judicial and what extrajudicial acts or proceedings it is necessary to know exactly what is a *judicium*. Not everything that a judge does is a judicial act, but only what he does *in judicio*. Commentators in l. II., "de Judiciis," generally give the following definition: *Judicium est legitima controversiae inter Actorem et Reum ortae apud Judicem disceptatio et definitio;* that is, the examination and decision of a matter in issue between plaintiff and defendant, made by the judge according to law. All the parts of the definition are essential; there must be a matter at issue between

[1] Matt. xviii 15 ff.

opposing parties; the examination and inquiry must reveal the truth of the case to be stated in the judgment or sentence; all this, however, must be done by a person invested with the necessary power or jurisdiction, the judge, who must proceed in the whole trial according to the rules and norms set down by the law.

All acts of a judge belonging to the conduct of such a trial are judicial; all others are extrajudicial. It follows from the foregoing that not every jurisdictional proceeding is also judicial. In fact, the exercise of the episcopal jurisdiction partakes only to a very small extent of a judicial character. Most of his administration is extrajudicial.[1] Even when he has to guard the laws and discipline of the Church by removing occurrences of abuse, incentives of scandal, wilful occasions and proximate causes of delinquency, the means to be employed are still extrajudicial. In the case of clerics these are mainly, according to the *Instructio*, art. 4, admonitions paternal as well as canonical, the command to make the spiritual exercises, the special precept, and the extraordinary means of the Tridentine suspension *ex informata conscientia*. Nor does it follow that these acts of the bishop should be called judicial because certain rules and norms of the law must be observed. Not all legal acts, acts performed under certain forms of law, are judicial proceedings. Nay, more: the bishop might proceed against a cleric for a criminal offence, lay a heavy punish-

[1] *Pierantonelli*, prooem. n. 3. In fact, all the functions which belong to what canonists call the bishop's *jurisdictio administrativa*, *politica*, *correctionalis* are properly speaking extrajudicial. With regard to criminal jurisdiction the bishop is not bound to proceed judicially, even were the crime fully established, as long as by extrajudicial proceeding the object of the law can be secured. And as concerns civil litigation of clerics, we think the party or parties will always find it to their interest, if the bishop settle the matter extrajudicially.

ment on him, and yet all without judicial form or trial, by mere extrajudicial or administrative procedure. True, he can do this only with the free consent of the delinquent, and under special circumstances.

44. There is yet another question to be answered: when shall these different kinds of procedure, the judicial and extrajudicial, be applied? This question can be fully answered only when we come to treat of each of these procedures in particular.

According to the direction of our Lord the first of these, the *monitio paterna*, should be first employed; if this does not suffice, then the *monitio canonica* and the *praeceptum* may be tried; finally, as a last remedy, the criminal trial is resorted to. Ordinarily, therefore, the last should not be employed before the second, nor this one before the first has been tried: this is the regular course. The admonitions, however, as special fatherly and official warnings are supplied in many cases by general laws previously enacted, which thus become constant monitors. Frequently also, from the very nature of the delict, criminal procedure is immediately in order, as in the case of the *notorium*.

Hence, the above question may, in general, be answered according to the principle *Nulla poena sine lege*. If a certain action of the ecclesiastic was already threatened with punishment by a law, then it may be imposed after the proper proceeding; but if no punishment had been annexed, then it is first to be threatened in a special proceeding for that purpose.[1]

[1] Certain principles from which an answer to the question can be derived are generally laid down by canonists, in l. v. tit. 1, when speaking of the duties of the judge consequent upon a denunciation. Cfr. also *Stremler*, p. 163.

Art. II. Accusatorial and Inquisitorial. The Instruction.

45. The forms of the judicial criminal procedure will greatly depend on what one considers to be the general principles of criminal law. When inquiring for these we must not lose sight of the fact that the procedure is only a means towards a certain end. As to this the *Instructio*, art. 11, observes in a general way: "*Processus instruitur . . . et ad finem perducitur eo consilio, ut omni studio atque prudentia veritas detegatur et cognitio tum criminis cum reitatis aut innocentia accusati exurgat.*" The principal object of punishment in the criminal system of the Church is the reformation of the offender. If the ultimate *object of the punishment*, the amendment of the delinquent, is not obtained, it is mostly his own fault; however, we are not now concerned with that, but rather with the *object of the criminal procedure*, which we have said to be the investigation and discovery of the truth. If this object is not obtained, if the truth is not discovered, the fault lies, independently of accidental circumstances, either in the rules of procedure themselves to which the judge is bound, or in the application of these rules.

Two further questions then arise: how must the judicial criminal procedure be regulated by the law in order to make the discovery of the truth possible? and, how can the judge by the aid of these rules of criminal procedure discover the truth? The second question will be answered later; at present we have only to do with the former.

One could reason quite extensively *a priori* as to the best rules of criminal procedure, but the deductions obtained would be the same as the results of experience derived from the history of the criminal procedure.

Procedure by accusation and by inquisition are the two

principal forms of strictly judicial criminal proceedings known to Canon law.[1] We may dismiss a third form, that by judicial denunciation, which in some parts is like the accusatorial, in others more like the inquisitorial procedure.

46. In procedure by way of accusation, the plaintiff appears before the judge and fully spreads out before him the evidence already collected; then the accused appears and presents in opposition his materials of defence. Upon all the material thus presented the judge bases his decision without inquiring further whether perhaps any other evidence might be found of the guilt of the accused whom he must acquit, or whether the accused whom he must condemn might not have been able to produce more counter-evidence to obtain his acquittal. At most, he may say *non liquet*, the matter is not clear to me; furnish me further evidence.

In a proceeding by way of inquiry, on the contrary, the judge acts *ex officio*. There is no plaintiff in this case whose duty it would be to furnish the evidence. The judge himself has to collect the material, and when he has enough, or can find no more, he passes sentence. Not until after he has himself collected all the material does he enter upon the logical and juridical question as to whether an offence was committed, and if so, what one, and what punishment ought to be inflicted.

With regard to the parties, they can be properly spoken of only in the accusatorial proceeding. For it is only here that plaintiff and defendant appear before the judge with equal rights and equal liabilities. The one and the other must support his own cause as well as he can, as the judge will not do anything to furnish evidence for either one. Nor does it matter much, as re-

[1] Commentators in l. v. tit. 1 explain fully the different character of these proceedings. Also *Van Espen*, III. tit. 8, c. 1.

gards the form of proceeding, that the plaintiff be a public officer, the fiscal procurator. But in the purely inquisitorial proceeding no accuser or prosecutor need appear. Enough that the judge have information of a crime committed, and he must proceed *ex officio* to a judicial inquiry, in order to collect whatever evidence there may be to prove the crime. True, here also the accused may defend himself, yet not against his equal, but against the judge.

Again, the trial will differ quite materially with regard to defendant according as the procedure is accusatory or inquisitory. For, in the first case the accusation is at once laid before the accused and an opportunity of immediate defence given to him; the defence is completely left in his own hands. He may defend himself to the utmost or waive all defence, plead guilty or let plaintiff try to prove the charge without opposition. In the purely inquisitorial proceeding the defence seems to proceed from the judge as much as the charge. It is the judge who must inquire into everything that might prove the accused not guilty. And although in this the accused may assist and help the judge, yet he certainly appears as one to be examined rather than to defend himself.

47. In the course of time many changes were worked out in these kinds of the earlier canonical procedure, so that their characteristic features could hardly be distinguished any more. The new form of canonical trial established by the *Instructio* of 1880 seems to combine some features of both older procedures.[1] Technically, indeed, it is called an inquisitorial procedure. Yet, although the judge himself, in order to come as near the truth of the matter as possible, takes the principal part through his auditor in collecting the evidence, nevertheless the fiscal

[1] Cfr. our remarks in the *Preface*.

procurator appears as the real accuser. On the other hand, such important privileges are granted to the accused in respect to his defence, that as party in a criminal trial he may be very well satisfied with the position allowed him by the *Instructio*.

The Instruction starts from the principle that it is the duty of the bishop to punish and to correct the delinquent. His authority is therefore interposed *ex officio*. That a suit be instituted depends no longer on a private complainant; nor is it the judge who enters a formal accusation, but the public prosecutor, the fiscal. The further *ex officio* proceeding, the investigation by the judge, approaches the principle of the Inquisition. In the purely inquisitorial procedure the judge, as before noted, exercises two opposite functions, those of accuser and judge; something that modern views do not approve. Hence the judge of inquiry, according to the *Instructio*, does not proceed any further than to collect all the material; with this he has performed his part as accuser;[1] he retires from the case leaving this part to the fiscal procurator, who must now continue the prosecution. On this last stage the principle of accusation is again predominant. When giving judgment, the judge is only judge and no longer accuser. The more the inquisitorial form obtains, the greater is the activity of the judge; while in the litigious or accusatory one he has only to conduct the proceedings and render judgment.

That no transgressions may escape the notice of the court, the *Instructio* introduces the inquisitorial method; but that the judge may appear as an impartial judge, not as a party, is the object of the accusatorial form.

[1] Not exclusively nor mainly as such; for he also collects whatever defendant may plead for himself. Cfr. *supra*, n. 28.

Art. III. Plenary and Summary.

48. We have repeatedly had occasion to remark that the *Instructio* regulates only the *summary* disciplinary and criminal procedure. In the preamble it allows the Ordinaries in the exercise of their disciplinary jurisdiction over clerics to make use of plainer and more expeditious forms, *formas magis oeconomicas adhibere;* and according to art. 10 the judge may proceed *formis summariis et absque judicii strepitu.* How then are we to conceive this summary proceeding? What is its nature?

In civil as in criminal cases canonists distinguish between the plenary and the summary proceeding. The expression summary process in a civil case frequently suggests a somewhat hasty proceeding, where the decision is only provisional and subject to a thorough examination and final judgment in a subsequent ordinary trial. Such, however, is not the true sense of the term in Canon law, least of all when referred to a criminal case. The difference between plenary and summary proceeding is thus stated by Ferrante:[1] "*Judiciorum divisio petitur ex diverso modo, quo illa exercentur; vel enim sunt ordinaria in quibus servantur solemnitates omnes juris, vel summaria, in quibus ea servantur, quae necessaria sunt ad rei veritatem detegendam, reliquis omissis, quae magis ad solemnitatem judiciorum, quam ad rei necessitatem pertinent.*"

Cardinal *de Lucca* enumerates several of the superfluous solemnities of the trial, which he calls *judaisms*, that is Jewish subtleties:[2] "*Ordinarium judicium est illud, quod exigit solemnitatem libelli, et litiscontestationis ac etiam publicationis ac conclusionis, aliasque solemnitates ab utroque civili et canonico jure praescriptas. . . . Summarium verum*

[1] Elem J. Can., c. 3.
[2] Rel. Curiae R., disc. 1. n 25.

est illud, quod dictis solemnitatibus non subjacet, sed nullas vel alias respective exigit pro diversis stylis."

49*. Commentators explain the nature and characteristics of these different trials under tit. 1, l. 1. The plenary proceeding is called *plenarium*, because the rules and formalities prescribed by law are fully observed; *ordinarium*, because this full procedure was ordinarily instituted in judicial trials, according to the order of the law; *solemne*, because most of the formalities to be observed were prescribed by the law not directly in the interests of justice, but rather for the solemnity, dignity, and majesty of the court. It is easily understood why such trial was said to be carried on *cum strepitu forensi*, with public pomp and noise.

The other kind of proceeding was called *summarium*, because it was so abridged as to exhibit only the sum or substance of a regular trial; *extraordinarium*, because it could be used in special cases only indicated by the law; *oeconomicum*, because it prevented waste of time, work, and expenses by a more expeditious way of arriving at a decision; *simpliciter et de plano*, because of its simplicity and plainness as against the pompous display of the plenary; finally, *sine figura et strepitu*, for the same reason.

We consider the matter important enough to show more clearly yet the difference between both procedures; for, as a great canonist remarked twenty years ago, nearly all ecclesiastical trials may nowadays proceed *in forma summaria*.[1]

Any one desirous to get in a moment a general idea at least of all that is implied in a plenary trial, may take Vivès' edition of *Reiffenstuel* and run through the index of vols. 2, 3, or do the same with Professor *Santi's* work, vol. 2. He will probably find more than he desires. For

[1] *Acta S. S.*, v. p. 39. The remark is from a dissertation, *de judiciis summariis*, l. c., by *Avanzini*, the founder of the *Acta*.

a fuller exposition let him read *Dr. Smith's* work, vol. 2, p. II. ch. III. It is impossible here to indicate all those formalities. Suffice it to explain shortly what formalities may be left out in the summary proceeding, which is clearly and distinctly described by Clement V. (Clem. *Saepe* 2, de verb. signif., v. 11). According to this constitution the judge need not demand a bill of complaint, nor insist on a formal contest over the issue; he may hold court on legal holidays; he should cut off delays, and as far as possible shorten the trial by refusing to admit unnecessary and dilatory pleas and appeals, and by putting a check to contentions and quarrels between the parties, the advocates and attorneys, and a superfluous production of witnesses. On the other hand, he must be careful not to exclude any necessary evidence or lawful defence. Moreover the summons must be served, nor shall the oath against malice and slander, or the oath of true testimony be omitted.

From the foregoing statute canonists conclude that in the summary proceeding all those formalities, subtleties, and nice points may be omitted which are only the work of human will; but that such means, rules, and proceedings which are by natural or divine law required to serve truth and justice, or which Canon law declares to be substantial and essential to every judicial trial, cannot be set aside without rendering the whole proceeding void. As the *Instructio* puts it, the judge may proceed in a summary manner *servatis semper regulis justitiae substantialibus* (art. 10). Yet these are only general rules subject to widely diverging interpretations, and as various application in practice. In order, therefore, to guarantee the full rights of justice, and to insure at the same time a regular and uniform canonical procedure (preamble to *Instr.*), the Sacred Congregation has expressly laid down those substantial norms in its now famous Instruction. They are

enumerated by *Rota*, n. 603, under eight heads, as follows: 1. The summons; 2. All relevant evidence for the prosecution as well as the defence; 3. The oath against malice, and that for true evidence; 4. The right of defendant to file his articles: 5. A sufficient term given him to do so; 6. Exceptions and interlocutory appeals; 7. The summons to defendant to hear the sentence; 8. Sentence to be given in writing. *Craisson*, n. 6005, adds another; viz. that any petition of defendant shall at once be put on record. This is also implied in the more general rule given by *Pierantonelli*, prooem., n. 2, that all such documents shall be filed with the acts as may be required afterwards to prove to the interested parties or to the higher authority that the essential forms of a just trial have been observed. Here we suspect to see the reason why the *Cum Magnopere* demands so much writing, *in scriptis*.[1]

50. The summary proceeding, evidently, is just as thoroughly conducted as the ordinary, and nothing is omitted therein that may be useful or serviceable in the discovery of the truth. Only the non-essential formalities, which Canon law drew to a considerable extent from the Roman, may be omitted; their omission does not make the proceeding null.[2] We must pass by the history of this procedure. That its importance, however, may be

[1] We call attention to the remarkable difference of art. 9 in *L'Ordinario* from the same article in *Cum Magnopere* (see appendix). We infer therefrom that in Italy and France the solemn proceeding is still to be considered the normal or ordinary one, and where it can be freely and successfully carried out, it must be done. *Rota*, n. 607. For the bishops of the United States, however, no other procedure is made obligatory or even left elective than the summary one, as established by the Instruction.

[2] *Rota*, n. 611. pertinently remarks that the two clauses to proceed *summarie, simpliciter et de plano*, and the other, to proceed *sola facti veritate inspecta* must not be confounded. The first simply implies our summary procedure, whereas the other refers to a kind of trial without any proper order or form, and which canonists call a strange, odious, and ter-

thoroughly appreciated, we wish to observe that the great Innocent III. prepared its introduction; Boniface VIII. granted it first to the Dominicans, and later to the other orders. Gradually, under the furtherance of Popes Clement V., Sixtus V., Pius V., and Clement VIII., it found admission into the ecclesiastical courts for the secular clergy. It became more and more evident that too many formalities only conduced to lengthen the proceeding, to furnish numerous grounds of nullity, and to serve chicanery, while justice and truth would be forced to retire. In the plenary trial they clung more to the letter of the law, as the Pharisees did at the time of Christ, whilst in the summary one they strove to grasp the spirit and substance of the law. At Rome the summary procedure has enjoyed the greatest favor[1] for more than a century, whereas the ordinary one has gone almost entirely out of use. In the S. Congregation of Bishops and Regulars, to whom the appeal lies in criminal cases of ecclesiastics, the summary procedure is exclusively employed;[2] and in appeals on account of errors of procedure, it passes sentence of nullity only when an essential form has been violated.[3]

*Note**.—As this work treats only of criminal procedure, it is unnecessary to explain the distinctive features of both the civil and criminal trial. Suffice it to call attention to the notable distinction by canonists between a civil suit against crime (*de crimine civiliter*) and a criminal trial (*de crimine criminaliter*).

rible proceeding. It is also called *judicium statarium, ex abrupto, more belli*, and takes place when, on account of the notoriety, atrocity, and cruelty of the crime, the judge is content with any solid proof of the fact in order to pronounce sentence at once. The difference is evident.

[1] De Lucca, l. c., disc. 34. n. 6.

[2] See *Appendix*.

[3] De Lucca, l. c., disc. 38, n. 22.

CHAPTER II.

JUDICIAL EVIDENCE.

Art. I. General Remarks.

51*. Judicial evidence,[1] in the modern acceptation of the term, is all that is offered and admitted in court as tending to prove or disprove the matter in issue. *Judicial proof* is the clear and evident demonstration of the matter at issue, made in court by judicial evidence. There is no proof without evidence, but there may be evidence without proof. Canon law and canonists, when speaking *de Probationibus* (l. II. tit. 19), treat only of the general questions concerning evidence, leaving it to succeeding titles to treat in detail of the special kinds of evidence.

The treatise on evidence and its use in criminal courts is evidently of the highest importance. The whole and sole object of criminal procedure is to prove the existence of the crime, to demonstrate the truth of the charge. Whether the fact be proved or not depends on the evidence admitted in court. Hence the many questions concerning its nature, legal character and weight, effect, object, and the modes or methods of introducing it. It is plainly impossible, in a little work like the present, to develop these questions as fully as they deserve, and we must refer our readers for fuller information to the commentators and authors generally quoted.[2] A few of the

[1] *Bouix*, t. I. p. I. sec. VI.; *Craisson*, n. 5698 ff.; *Smith*, n. 813 ff; *Sanguineti*, n. 587 ff.—Nearly all of this second chapter is written by the editor.

[2] We cannot suppress the remark that to get acquainted with some compendious writer on the Common law of Evidence such as. e.g. Sir J. Stephen, H. Roscoe, T. Starkie, would prove not only very interesting,

more important preliminary remarks may find a place here.

Different Kinds of Evidence.—We distinguish *direct* (*inartificialis*) and *indirect* (*artificialis*) evidence. The first is such that it tends of itself directly and immediately, without the intervention of proof of another fact, to establish the existence or non-existence of the fact in question. Indirect (presumptive, circumstantial) evidence is that which tends to prove a fact by proving directly the existence of another or others from which the first may be inferred (see n. 84).

Again, we distinguish *parol* (depositions of witnesses, admissions of the accused) and *documentary* (written) evidence (see n. 85). The distinction observed in Common law between *primary* and *secondary* evidence becomes useless when speaking of Canonical criminal procedure.

52*. *The Weight of Evidence.*—Here we have first to explain the important distinction between *perfect* and *imperfect* evidence,[1] or such that will establish a full proof (*probatio plena*), or only semi-proof (*p. semiplena*). Perfect or full evidence is that which is of itself sufficient to convince the judge of the existence of the crime; in other words, evidence sufficient to establish the truth of the matter previously at issue. The judgment, consequently, must always correspond with perfect evidence. Canonists sometimes speak of the fullest or clearest evidence or proof (*probationes appertissimae, evidentissimae, luce*

but highly instructive for our future clerical advocates and *jurisconsulti*. They will certainly gain a clearer insight into the *rationale* of some rules of the Canon law on Evidence. For like reasons we refer to *Henry and Harris*, where the part on evidence (pp. 106–365) is undoubtedly the most interesting for a clerical reader. If an able Catholic lawyer would give us a book on Ecclesiastical Trials in the nature and style of the one just named, it would be a great boon.

[1] Not exactly the same as *prima-facie* and *conclusive* evidence in Common law.

clariores), meaning proofs so evidently establishing a fact that even to suspect any possible proof to the contrary must appear unreasonable. This highest degree of evidence is required in criminal cases to justify sentence by which any of the severer punishments, e.g. degradation, is to be laid on defendant, on the principle that "*Satius est impunitum relinqui facinus nocentis, quam innocentem damnari.*"[1] However, to give sentence even for some slighter punishment, the judge must be sustained by full evidence of the crime. Imperfect evidence, if it be not offered in such abundance as to make a full proof, cannot convict the accused. The judge must in every case be at least morally certain of the crime, without any reasonable doubt to the contrary.[2]—Semi-proof arises from imperfect or insufficient evidence. Such evidence merely establishes a probability, greater or less, but no certainty of the crime.

Bouix[3] enumerates six kinds of *perfect* evidence: 1. The depositions of at least two classical witnesses to the same point; 2. An official or otherwise authentic document; 3. Conclusive presumptions of law (*juris et de jure*): 4. In civil actions the oath (*juramentum decisorium*) made by one party on the request of the other; 5. The judicial confession; 6. The evidence or notoriety of the fact. *Imperfect* evidence is furnished—1. By the deposition of one witness, or of several single witnesses, or of two non-classical witnesses; 2. By writings of a private character; 3. By a document admitted as authentic only on the strength of the handwriting; 4. In civil actions by the oath (*jur. suppletorium*) demanded by the judge in confirmation of a statement; 5. By inconclusive presumption; 6. In civil actions by public rumor when legally proved.

Another important question concerning the weight of

[1] C. J. Civ. [2] *Instructio*, art. 16. [3] Vol II. p. 303.

evidence arises in case of opposite or contrary evidence; viz. the question of its prevalence. *Santi*[1] very nicely explains the question. We give his rules.[2]

In case of conflicting evidence the judge must see first whether it be a true or only an apparent conflict. If there be real opposition, the evidence is either equally strong or it is not. If not, the principle is *major probatio praefertur minori* and consequently *plena probatio absorbet semiplenam.* If the evidence appear equally weighty on both sides, it is neutralized, and judgment in a civil case will be *non liquet*, in a criminal *non est repertus culpabilis.* In privileged causes, however, the judge would pronounce in favor of that cause. Other principles to be observed are that direct evidence is better than indirect; that specific and particular evidence is stronger than general; that two or even more half-proofs will not establish full proof against a criminal defendant except their combined weight tend towards the same point so strongly as to produce positive certainty.

53*. *The Object of Evidence.*[3]—The general rules as commonly stated by writers on Common law[4] agree with those of Canon law. They are mainly the following: 1st. *The evidence must be confined to the point in issue.* Truth and justice demand the observance of this rule; the first, in order to avert confusion and obscurity which would arise from irrelevant matter freely introduced; the second, in order that, the true state of the case being established, justice may be more effectually done either as regards the law or the accused. Hence only such evidence can be admitted which bears directly or at least indirectly (collateral facts) on the issue; all irrelevant,

[1] h. t. n. 24 ff.
[2] Cfr also *Reiffenstuel.* h. t. n. 73 ff.
[3] *Reiffenstuel,* h. t. n. 31 ff.
[4] Cfr. *Bouvier,* s. v. Evidence.

foreign and useless evidence, no matter by whom it may be offered, must be rigidly excluded. Whether the evidence offered be relevant to the issue or not, the court will decide. 2d. *The substance of the issue must be proved.* Consequently in a criminal process it is absolutely necessary, but at the same time quite sufficient, to bring evidence of such a nature as will prove that defendant has *substantially* committed the crime as specified in the charge. If the evidence would show him guilty of substantially another, although very similar, crime than the one he is indicted for, the judge could not pass sentence upon him for this crime without a new charge and trial. 3d. *The affirmation of the issue must be proved.* In a criminal case, therefore, the prosecution must bear the burden of proof. There is an axiom, however, that *reus excipiendo fit actor*: i.e. defendant must give evidence in support of his pleas. From the curious rather than learned disquisitions of older commentators on the proof of a negative we gather the simple rule that a negative pure and simple admits of no proof whatever, whereas a so-called pregnant negative, which implies an affirmative, can be proved indirectly by proving the implied affirmative. 4th. *What is evident needs no proof.* This axiom can be applied only, at least in criminal law, to what is evident in law (*notorietas juris*), and what according to Common law is known by *judicial notice* or *recognition.* But evidence of fact (*notorietas facti*) admits of proof. Under this fourth rule come a great many cases covered by another canonical rule: *non probatur cui favet praesumptio juris*

54*. *Time to Introduce Evidence*—The general rules of Canon law are few. 1st. Evidence cannot be offered before the judge opens the case by hearing the charge of the prosecutor and the answer of defendant (*contestatio delicti*). This rule does not apply when the court pro-

ceeds either summarily or by inquisition. 2d. No evidence will be admitted after the conclusion. This, however, does not hold in matrimonial and more important criminal cases. Evidence may sometimes be admitted after the conclusion at the discretion of the court; but if a peremptory term has been fixed by the court for the purpose, no further evidence can be admitted after the lapse of that term.

55*. *Entry of Evidence.*—Evidence must be given to the court (*judici*), that is, to the judge or a person commissioned by him to receive or collect evidence, e.g. the auditor or even the clerk. All the evidence given must be carefully and truly recorded by him who receives it or by his clerk, documents by the *noting*, parol evidence by his minutes, etc. Evidence not given to the court or in court is no evidence.

Art. II. The Confession.

56*. The judicial confession[1] has ever been the *regina probationum.* Especially in the earlier inquisitorial procedure every conceivable effort was made to obtain a confession from the accused. But now no kind of coercive means, physical or moral, is employed to procure it; nay, art. 24 leaves it doubtful whether or not the accused should be forced, where that is still possible, to appear before the court.

The *examination of the accused*[2] follows immediately after his appearance in court (*Instr.*, art. 25). The wording itself of the article shows that the purpose of this examination is not to sustain the prosecution, but rather to exculpate the defendant if possible. Hence the auditor must especially here be on his guard against any mere

[1] Cfr. Commentators in l. II. tit. 18. *De Confessis.*

[2] *Pierantonelli*, l c., n. 17; *Rota*, n. 698 sqq.

prejudice that may have taken root in his mind during the preceding inquiry. He must not forget that he is neither prosecutor nor counsel, but an impartial inquirer after truth (*ut veritas pateat*). The author well remarks: "He must take care not to appear biassed, much less to disclose by the manner of examining his conviction of defendant's guilt. Even if he were convinced, he ought still to discharge his unpleasant duty in a generous, respectful and gentle manner towards his erring brother. It is only thus that the accused, if guilty, will acknowledge his fault at once; it certainly is the only way to get, not a one-sided, but a full and impartial view of the whole case."

The questions or interrogatories to be put to the accused may be divided into general and special, as in the examination of witnesses. The special questions must be, at least in some respect, relevant and material to the issue. Yet no *leading* or suggestive questions are allowed. Even when inquiring about particular circumstances or details, the question must be put in such a way that the accused is not thereby forced or unavoidably led to directly commit himself. Leading questions, however, are allowed if the auditor has already manifest proofs of the defendant's guilt. According to the *Acta S. S.*, XV. p. 391 sq., the auditor in examining ought to follow the order as given by the charge or the nature of the case. He should carefully avoid passing suddenly from one subject to another only to return as unexpectedly; this manner of questioning is mere trickery and a snare even for the innocent. Again, his interrogatories should be short and simple, and no one question should include things to be asked severally and separately. Moreover, it is advisable to begin with more general and lighter matter, and gradually come to special and more important points, which may give nearer and more seri-

ous indications of the crime. If the accused refuse to answer a legitimate question it does not amount to an admission, but will assuredly create a suspicion of his guilt.[1] Finally, the auditor should exercise great charity and never lose patience with the accused.

57. The accused cannot be compelled, like other witnesses, to take the oath to tell the truth (*juramentum de veritate dicenda*). This practice, formerly much used,—or rather abused,—was abolished by Pope Benedict XIII. at the Council of Rome, 1725;[2] the same Pope, however, declared it admissible when defendant is to confirm the truth of his statements concerning accomplices. But if he should upon the judge's request have taken such an oath for the statements concerning himself, the whole proceeding and the sentence based thereon would be *ipso jure* void. The auditor and the judge must be content with admonishing the accused to speak the truth.[3]

58*. The confession is either judicial or extrajudicial. It is judicial when made before the competent judge while in court. *In court* means, at least in a mere summary proceeding, in his official capacity as judge, but does not refer to the place where the trial or examination generally occurs. In this sense both conditions are necessary. Hence a confession made to the competent judge but not in court is extrajudicial; the same must be said if made in court yet not to the competent judge but only, say, to the prosecutor or the clerk. Canon law on this point is stricter than Common law.

In regard to the question, when is a confession evidence in law, one must very carefully distinguish between

[1] S. C., 6 Sept. 1713. AJP., XIII. 29, 94; *Acta S.S.*, XV. 392.

[2] The decree is given in the *Coll. Lacensis Conc. Rec.*, I. 364.

[3] *Notification*, 24 Apr. 1728. AJP., XIII. 48 f., 91 f.; XIV. 972, 39; XX. 449, 1.

civil and criminal trial. We speak of the latter only. In this case an extrajudicial confession is no proof whatever, not even semi-proof. The conviction of a criminal must be, as the canons say, by evidence clearer than sunshine (*probationibus luce meridiana clarioribus*). Such a confession, when properly brought before, and proved to, the court will make at most presumptive evidence, or furnish grounds for special inquiry.

A judicial confession in order to be full proof in court, must have certain qualities expressed by the Gloss in the following verse:

Major, sponte, sciens, contra se, ubi jus fit, et hostis;
Certum, lisque: favor, jus nec natura repugnet.

Major, that is, one considered of full age by the law. *Sponte*, freely, not by force, threats, fraudulent promises or inducements, even if offered by the judge. *Sciens*, with clear and full knowledge, and without error in fact. Hence a confession made on the impulse of passion or great provocation would not be proof, except it be confirmed by the accused after the passion has passed away. *Contra se.* This in a criminal case can refer only to the qualification in a so-called qualified confession. The confession will always be against the defendant, but the qualification will generally be some circumstance in his favor, e.g. that he committed the delict without proper advertence or deliberation, or in ignorance of the law, or on a necessary occasion. A qualified criminal confession is, according to canonists, divisible. While accepting the confession, the judge will refuse the qualification favorable to defendant until the truth of it shall have been established. This condition implies, moreover, that the confession shall not be proof against any of his accomplices, but only against himself. There are, however,

some exceptions to this rule, inasmuch as Canon law admits a criminal confession and testimony against his accomplices in the following cases: 1st, in exceptional crimes;[1] 2d, in occult cases when, on account of the nature of the crime or circumstances, it is difficult to obtain evidence in court; 3d, in crimes which by their very nature cannot be committed without one or more accomplices; 4th, in crimes the final execution of which is still left to the accomplices; 5th, in any other crimes, if the confession, i.e. the testimony of the accused against his accomplices be supported by other evidence given in the case. The bare confession of the accused as a rule is no evidence, not even against his accomplices, according to the Gloss: "*Nulli ergo de se confesso, super crimine aliorum creditur.*" *Ubi jus fit* means in court to the judge. *Et hostis*, in presence of plaintiff or prosecutor, a condition required only in Civil, not in Canon law. *Certum*, the confession must be clear and definite; an ambiguous, uncertain and vague confession is null. *Lisque*, it must be on the matter at issue, on the crime of which he is accused; not on foreign matter, even if that were another crime. As to the last three conditions, it is impossible to explain briefly the meaning of the phrase "*favor non repugnet.*" With reference to a criminal confession, how-

[1] Exceptional crimes (*crimina excepta*) are those of a more pernicious character, being in effect directly injurious to, and destructive of, the foundations of society whether ecclesiastical or civil. Hence, in order the more promptly and effectively to save the public welfare against such attacks and the sooner to convict the criminal, the courts in trying those crimes were not bound to observe all the formalities and rules of a criminal procedure. And because of these exceptions from the regular proceeding the crimes were themselves called *excepta* (for which term we are unable to find a better English equivalent than *exceptional*). Among these crimes the commentators generally enumerate treason, forgery either of money or public documents, highway robbery, assassination; then heresy, simony, sacrilege, sorcery, etc. Cfr. *Reiffenstuel*, l. II. tit. 18, n. 99 ff.

ever, it is not at all pertinent. This may also be said of the other two, which simply mean that the confession must not imply what is impossible either in the nature of things or at least by law.

59*. What is the effect of a valid judicial confession? It is manifold. First, such a confession is full proof of the charge and makes any further evidence unnecessary, because it renders the delict notorious *de jure*. All that remains for the judge is to satisfy himself that the confession is valid, i.e. has all the necessary qualities, and then pronounce sentence. Secondly, it renders valid any previous defective proceeding. Thirdly, if made after defendant has already been convicted, it deprives him of the right to appeal. May defendant recall his confession? Yes, if he does so in a continent proceeding, *in continenti*, as the phrase is, i.e. during the same examination or hearing, but not after an interruption.

Is defendant, if guilty, bound to confess it when lawfully asked by the judge? We limit the question strictly to our subject, the canonical trial of a cleric, and answer in the affirmative without any exception. Cfr. *Konings*, Theol. Mor. n. 1072. The plea of "not guilty" in American law, with the mental restriction "because not convicted" or the like, is not admitted as yet by any canonical statute. The case of capital punishment, imprisonment for life, or deportation, in which some famous canonists and moralists allow defendant, not to lie, but to evade a direct confession, has no application in ecclesiastical courts.

Art. III. Testimony of Witnesses.

60*. Among evidence strictly so called, the testimony of witnesses holds the first place. The importance of the matter explains why Canon law no less than Civil and

Common law embodies so many rules concerning such evidence, and why canonists have written such extensive commentaries on these titles of the *Corpus Juris.*[1] For our purpose, and confining ourselves as far as possible to the criminal trial, we shall divide the whole complex matter into five parts; viz. on the competency, the authority, the attendance, the examination of witnesses, and the publication of their testimony.

1. The Competency of Witnesses.

Although writers on Common law[2] distinguish between competency and credibility of witnesses, yet we include the second in the first. A witness is admissible in the court (competent) only on the supposition of his credibility. The contrary were absurd. Hence we understand by competency the legal fitness and ability of a witness *to be heard and believed* on the trial of a cause. His testimony, if it turn out to be quite improbable and incredible whether in itself or compared with contrary testimony, becomes also incompetent, i.e. of no value in the cause. As the whole object of testimony is to testify to fact (not law), the law can recognize only him as a competent witness whom it supposes *to know* the fact and *willing truthfully to state it.* To these two qualifications all the rules of law on the competency of witnesses can be reduced, and it will be easily perceived that incompetency on the grounds of natural law refers mainly to the first qualification, while incompetency established by positive law refers rather to the second. This, again, explains why the one kind is *absolute*, no matter whether the trial be civil or criminal, whether the witness be for the de-

[1] L. I. tit. 20, 21. For a practical illustration of some of the legal questions see the Causa Mediolan. 1884, in *Acta S. S.*, XVIII. 64 ff.

[2] *Bouvier*, s. v. Competency.

fence or the prosecution, while the other is only *relative* according as the law considers the witness under certain conditions willing to state the truth or not.

a. By *natural law* all those are incompetent witnesses who are deprived of the right exercise of their reason or of their senses either at the time when they testify or at the time of the fact to which they are to testify. The one prevents them from perceiving the fact; the other, from correctly stating it. To this class therefore belong infants, idiots, lunatics, and intoxicated persons; then the blind, the deaf, and the dumb in regard to the sense of which they are deprived.

b. By *positive law* some are absolutely incompetent; thus on account of age impuberals, i.e. children above seven but not yet fourteen (boys) or twelve (girls); again, slaves, on account of their condition; paupers, because suspect of being bribed[1] by the party producing them. A large class of witnesses are incompetent because of the law excluding infamous (*infames*) persons whether they be such by law (*inf. juris*) or in fact (*inf. facti*). Of the first class are those whom the law itself deprives of their honor and political right on account of crime of which they are guilty or judicially accused. Infamous in fact are those who on account of the crime committed by them lost their honor and good reputation in the opinion of good and honest people, although no statute brands them with infamy.[2] Infamy in fact will be removed by manifest repentance and amendment, by an honest and becoming life for a longer period; but infamy

[1] Gloss: *quod lucri gratia quid facile admittat*, quoting Prov. xxx. 9 Yet Canonists also had an axiom: *magis creditur virtuoso pauperi quam diviti vitioso.* Hence if the pauper established his honest character to the satisfaction of the court, he was admitted as witness.

[2] See a detailed exposition in *Reiffenstuel*, h. t. n. 29 ff.; *Santi*, h. t. n. 4 ff.

by law can be removed by the law only; i.e. by a positive and authoritative declaration (*abolitio, dispensatio*).

Persons excommunicated and to be avoided (*vitandi*) are also incompetent. Those who are tolerated, although publicly known to be excommunicated, are also incompetent if objected to by the opposite party.

61*. Relatively incompetent are those witnesses who may testify in some but not in all cases.[1] Some, again, may be admitted for the defence but not for the prosecution, or *vice versa*. According to Canon law the following persons cannot testify in a criminal case: minors under twenty years; women, if the procedure be accusatorial; persons directly interested in the result of a suit. Persons cannot testify against those whom they bitterly hate, nor against their near relations by blood or marriage. Jew or Pagan shall not bear witness against a Christian, nor heretics against those of the fold, nor as a rule layman against cleric, nor clerics or religious persons against others in *causa sanguinis*, i.e. where, in case of conviction, sentence will be for death or cruel mutilation. But neither sex, nor clerical orders, nor religious profession, nor near relationship by blood or marriage can render a witness in a criminal suit incompetent for the defence.

There is one more class of persons who may be called in a sense incompetent; viz. those who are privileged and cannot be called, much less compelled, to testify. See below, n. 66.

In regard to incompetent witnesses two important observations are still to be made. First, the judge is not forbidden to hear their testimony in court, only he must

[1] *Bouvier*, s. v. Witness: "The testimony of such as are generally qualified and competent under other circumstances or as to other matters is something excluded out of regard for their special relations to the cause in issue or the parties, or from some other circumstances not working a general disqualification."

not allow it to influence his judgment. For such testimony is not legal evidence, nor can any sentence be based on it without becoming *eo ipso* void; yet it may give the judge some clues and hints to guide him in the further inquiry.[1] Second, incompetent witnesses must be admitted in the trial of exceptional and of notorious crimes, also in cases where competent testimony cannot be had; e.g. seduction or solicitation of a child. However, their evidence will not be full proof, except when supported by other evidence.

2. The Authority or Weight of Testimony.[2]

62*. In weighing the evidence given by witnesses the judge must consider three things: first, the credibility of the witness; second, the strength of his testimony when compared with that of other witnesses; third, the quality of the deposition.

With regard to the *first*, we remarked in the preceding paragraph that incompetent witnesses could give no proof, not even half-proof, but at most so-called *indicia* or conjectures. Even in cases where the law admits their testimony, it amounts only to the force of a presumption. Full proof is supplied only by competent witnesses. These are sometimes called classical witnesses, and again *omni exceptione majores*, beyond all exception,

[1] Our author says on this point: "If the judge is disposed to consider witnesses as classical who are not such, the accused may enter an exception thereto. Should the judge administer the oath to witnesses who ought not to be sworn, he is himself responsible therefor. But there is no objection against examining non-classical witnesses, though their testimony is not perfectly valid; for it may furnish the judge with facts leading to the discovery of fully competent witnesses, or may serve him as circumstantial evidence; but what weight he may accord to the testimony of non classical witnesses in a particular case, he must himself carefully consider."

[2] Cfr. *Rota*, n. 672 ff.

which does not mean that no exception has been *made* against them, but that if made it has not been *sustained* by the court.

Now, it is the general rule of Canon law that in civil as well as criminal trials the concurrent testimony of two classical witnesses, neither more nor less, is required to give judgment accordingly. Hence the axiom: *testis unus, testis nullus;* or again, *dictum unius, dictum nullius.*[1] There were some exceptions to this rule in cases against bishops or clerics, but modern canonists agree that those ancient laws have gone into desuetude, and that it is now left to the discretion of the court to determine in any particular case whether, and how many, more than two witnesses shall be required for the prosecution before it can conscientiously give sentence against the accused.

63*. In weighing and sifting the depositions made by several witnesses to determine their relative force upon the issue, lies one of the gravest and most difficult duties of the judge. All are agreed that no special rules can be laid down for him in this matter. He must judge of the evidence according to his own knowledge and sense of duty. However, a few general rules may guide him in the difficult task. The depositions of witnesses, whether on the one side only or on both, will either differ or not. Witnesses who make the same or alike depositions are called *concordant* (*testes concordes, contestes*); those who differ from one another are called *single* witnesses (*t. singulares*). In view of three possible hypotheses in such a case, canonists speak of conflicting, variant, and adminicular singularity of witnesses.

When the different depositions cannot be explained because one necessarily excludes the other, their evidence is conflicting (*s. contraria*). Both cannot be true. Evi-

[1] This, however, does not apply to expert witnesses. See below, n. 70.

dence is called variant (*s. diversificativa*) when there is no connection whatever or mutual relevancy between the several depositions, though they may all state what is true. Hence they are either all or at least some of them altogether irrelevant to the issue, and therefore inadmissible. Different depositions of witnesses furnish adminicular evidence (*s. adminiculativa, cumulativa*) when they testify to different facts so connected with one another that to prove one is to prove the other. It is clear that this connection of the circumstances or the facts must be first established before such depositions can be called cumulative evidence. Single testimony would give half-proof only, while full proof will be established by concordant testimony for the different circumstances or facts.

How shall the judge know the relative value of conflicting evidence furnished by witnesses? When is it equally strong? and if not, which is weightier? and when is that excess of weight still large enough either by itself or together with other evidence to cause conviction? No practical answer to these questions can be given here; it lies with the judge, who must consider not merely the respective number of the opposing witnesses, but moreover their intellectual and moral qualities, their position with regard to the matter at issue, and the qualities of their depositions.

64*. The quality of a deposition may refer to its contents, and to the manner and form in which it is given.

With regard to the first, canonists distinguish four kinds of evidence, viz. evidence of personal knowledge, of opinion, of hearsay, and of rumor. The first is that given by *eye-witnesses* (*testes de scientia*) and is the only true witness-evidence; the rest are not evidence of the fact at issue given by the witnesses themselves, but rather sources opened by these witnesses from which other evi-

dence on the issue may be drawn, such as rumor, declarations, authenticated documents, circumstances, and facts established by expert testimony, etc.

Evidence of opinion (*t. de credulitate*) here does not mean *expert* opinion, nor a lower degree of the mind's assent to its own judgment, "but a belief held as the result of inference and not of direct perception."[1] Such evidence is of no more weight than the inferences and conjectures together with the basis upon which they rest. Witness, therefore, must be examined on these points. How much strength may accrue to an opinion from the personal qualities of the witness, is left for the judge to consider.[2] *Santi*, h. t. n. 30, says of such evidence of opinion, "that if such opinion is supported by good reason, although it may not give a full proof, yet it will be quite an indication of the truth and a strong presumption."

Hearsay evidence (*t. de auditu*) is not admissible in court except when higher and better evidence cannot be had. The reason is obvious. Such depositions contain only statements and declarations made by others than the witness himself, consequently by persons whom as yet the court knows not. Declarations and statements thus offered carry no more weight than they derive from their authors and the circumstances under which they were made. Such evidence is second-hand only and cannot be worth more than the original. Hence, where there are several

[1] E. Robertson, in *Encycl. Brit.*, s. v. Evidence.

[2] Mr. Robertson, l. c., having stated that in Common law evidence of mere opinion is, as a rule, not admissible at all, very truly observes: "In thus excluding opinion on all but technical subjects, the law is stricter than the logic of ordinary life. The opinion of others tells for something in the formation of our own opinions, and no doubt *ought* to tell for something." *Query:* Is not this a principle of the Catholic doctrine of Probabilism, or, in other words, of that Catholic "examination of the influence of authority in matters of reasoning," as Mr. R. says?

hearsay witnesses the judge must first inquire after the author of the original statement. Cases are not unknown in ecclesiastical jurisprudence where an amount of hearsay evidence had been offered in court against a defenceless cleric, but through the searching efforts of a conscientious judge that formidable mass of witness shrunk down to the form of one evil-tongued woman. Again, hearsay evidence must not be accepted when the declarant himself can be brought into court; for in this case hearsay evidence would be legally suspect and therefore worthless.

Evidence of rumor[1] as given by witnesses (*t. de fama*) means their depositions in regard only to the existence or non-existence of a rumor relevant to the issue, the origin, extent, and nature of such public report; but their testimony is not to the truth or falsehood of that rumor. Where rumor cannot be traced to a certain origin or definite cause, the court must consider it as idle talk.

Depositions made by a witness in the course of a trial may be consistent or not. If they are, it is in favor of his credibility; if they are not, they must either conflict with or only vary from one another. In the first case, if witness corrected himself in the same continent hearing, the court may accept his correction and consider his first assertion as an error made in good faith. But if he recall his statement only after other transactions, especially after having seen the party producing him, or if he do not offer any explanation of his conflicting testimony, he will be considered as suborned or at any rate perjured and therefore not trustworthy nor competent. If his depositions be not substantially at variance, but only in their manner or in minor circumstances, and if he can satisfactorily explain the variance, the prior deposition will be admitted as evidence, except the later be more consistent with

[1] Cfr. *Reiffenstuel*, h. t. § xii.

other evidence known to the court. Doubtful, uncertain, vague, and confused testimony is no evidence. Be it remembered, however, that a witness may be somewhat confused, wavering and shaky in his outer manner, being agitated by excitement, while yet his deposition may be quite clear, definite and firm, and make good evidence.

3. Attendance of Witnesses.

65*. Under this head we shall, as far as our purpose requires, treat of the citation, compulsion and production of witnesses. *The citation* of witnesses is absolutely required, otherwise their depositions cannot be considered as evidence of the court.[1] If a witness should offer himself of his own accord, the auditor might send him a formal summons after having convinced himself of the witness's credibility. It would be advisable to have the summons signed by the auditor and his secretary. According to the *Instr.*, art. 14, the writ is to be served on the person either by a court messenger or some other qualified person, or even through the mail by registered letter. The fact of its having been duly served should be recorded; so also should the refusal of witness to obey the summons, as stated in art. 20.[2] The nature of our new procedure does not seem to call for any particular requisites of the summons; but as the inquiry is at first to proceed rather without the knowledge of the accused, it will be enough to state that witness is officially requested by the auditor, rightly appointed, to appear at such a place and at such a time, or, in case of being unable to comply, to state his reasons. Witnesses produced in court either by the defence or the prosecution need not

[1] Gloss: *Testimonium a non citato dictum non valet; hujusmodi enim testis non citatus deponens redditur suspectus.*

[2] Cfr. *Acta S. S.*, xv. 388.

be formally summoned, except on request; it is enough to state the fact in the acts.

Droste observes that the auditor may sometimes find it advisable not to summon a witness otherwise compellable, but instead of it to go himself to such person in order to obtain his testimony at once and thus prevent any collusion with the accused. Such proceeding, too, would have to be recorded. But if a competent witness refuse to obey the summons, can he be compelled to appear and testify in court?

66*. On the *compulsion* of witnesses[1] our author says: "According to Canon law the witness should first be admonished to appear and give testimony. If he decline he must make known and satisfactorily prove his reasons, the same holding true as to those circumstances which relieve him from the duty of taking the oath. But the court will decide whether his reasons are sufficient or not. It has been a matter of great discussion with canonists as to what may be done, if the witness declines without cause to testify against an ecclesiastic. For a time they held that witnesses could not be compelled to testify in criminal trials;[2] in recent times, however, they incline to hold it allowable at least when proof cannot be supplied in any other manner.[3] The proper way will perhaps be this: the judge admonishes the witness, if indeed he has appeared, to give his testimony; should he refuse either to appear or to testify, the judge will, according to art. 20 of the *Instructio*, make a note of it in the acts and try to supply the necessary evidence in some other manner. According to the rules of criminal legal interpretation this art. 20 excludes, in our view, the compulsion of wit-

[1] Cfr. *Commentators* in l. II. tit. 21: *De testibus cogendis vel non.*

[2] This opinion was based on a false interpretation of an incident phrase of Honorius III. (c. 10, X. h. t.).

[3] Cfr. *Craisson*, n. 5726.

nesses, even Catholics, although by the rules of the canons laymen may be compelled by excommunication, and clerics by suspension. Our opinion becomes the more apparent when we consider that the Council of Trent also admonishes to great caution in applying such coercive measures.[1] It is another question, indeed, but one which does not belong here, whether the witness is bound in conscience to testify against ecclesiastics[2] in criminal causes. This question should not be confounded with the judicial compulsion of witnesses." So far the author, with whose opinion the *Acta S. S.* seem to agree.[3] *Santi*[4] observes that in regard to compelling witnesses one must not strictly follow Canon law taken in a rigid sense, but rather custom.[5] We need not observe, however, that, any custom to the contrary notwithstanding, the bishop is justified in compelling by ecclesiastical censure witnesses to appear and testify, if the importance and nature of the case or the absence of other evidence make it necessary, of which necessity he alone is to judge. This is the common teaching of canonists based on the principles often expressed in the sacred canons: *ne pro defectu testium pereat sua justitia;* or again, *cum publicae utilitatis intersit ne crimina maneant impunita.* The jurisprudence of the Church as well as the State held it to be a public duty which every member owed to society, to give faithful witness whenever necessary.[6] If without cause he refuse to

[1] Sess. XXV., c. 3, de Ref.

[2] Even if not compelled to do so.

[3] XV. p. 389. Read *ib.* the very nice and important remark concerning witnesses who, although competent, ought not to be called, *quia non licet aut decet eos citare* (Cum Magnop., art. 20).

[4] L. II., tit. 21, n. 4.

[5] Cfr. *Rota*, n. 682.

[6] Axiom: *Officium testium est officium publicum:* A Protestant writer very well says: "Where the witness is guilty of contumacy, and stands in wilful contempt and disobedience to the lawful request of the Church, he may be arraigned, tried and expelled, which would be nothing but jus-

fulfil that duty, authority will and must compel him. On the other hand Canon law no less than Civil and Common law recognizes cases where the compulsion of witnesses for a criminal prosecution would be immoral and unnatural. Such is the relation between parents and children,[1] husband and wife, consanguinity and affinity to the third degree inclusively, and all those cases where on the grounds of public policy a person is bound by a special duty to keep secret whatever knowledge he obtained in virtue of his peculiar relation with the party concerned. The principle that confidential communications made to a person in his professional capacity are in some cases, as e.g. of clergymen, physicians, counsellors, and attorneys, exempt from compulsory testimony, is fully recognized in Canon law.[2]

These and the foregoing are called *privileged* witnesses in the full sense.[3] In a wider sense those also are called privileged who as a rule will not be compelled *to appear* in court, but yet must make their deposition to an authorized officer of the court (the auditor or a commissioner) either at home or wherever it may be convenient. Such are the old, the sick, the poor, and often women, high dignitaries, persons kept away by official duty or the commands of their superiors, and finally those living at too great a distance or under another jurisdiction. By an-

tice and right where such a one should be so wilful and disregardful of the well-being of the Church." *Henry-Harris.*

[1] All descendants or ascendants in the direct line.

[2] *Ballerini*, in his note to Gury, vol. I. n. 470, says: *Bonum commune postulat, ut ne metu revelationis homines priventur commodo consilii aut auxilii necessarii quaerendi, quod tamen quaererent nunquam nisi certi de secreto servando forent. Postulat ergo bonum commune ut quousque committens licite potest suum secretum servare, jus retineat ne alter illud prodat.* Cfr. *The Month*, May 1883, "On Privileged Communications," pp. 27 ff. *Henry-Harris*, chapt. VI., "The Exclusion of Evidence based on Public Policy."

[3] Cfr. *Reiffenstuel*, h. t. § ii.

alogy the above provision may be observed with those who are willing to testify but refuse for whatever reason to appear in court.[1] If witnesses live at such a distance from the judge or auditor as to render their examination considerably difficult, a capable cleric living in their neighborhood may be commissioned to take their depositions. When witnesses are to be summoned and examined who live under another jurisdiction, the court will by *letters rogatory* request the bishop of the other diocese to have the witnesses duly examined there and an authenticated report thereof returned (*Instr.*, art. 19). If persons in the above cases were to offer or send to the court written statements or depositions, although duly signed by their hands, it would at most be extrajudicial evidence.

Subtraction or concealment of witnesses is punishable also in Canon law.

67*. Of the so-called *production of witness* little need be said, whether we ask *how many* witnesses may be brought in and *when*, or *how often* the same may testify. Our procedure being summary and by way of inquisition, it is mostly in the power of the judge to determine the number of witnesses to be allowed for the prosecution as well as the defence *servatis justitiae regulis.* These are mainly two: first, to allow as many witnesses as are necessary for both sides to establish the truth of the matter at issue; secondly, not to allow an unnecessary array of witnesses,[2] which would only delay the decision, confuse the evidence, annoy and vex all others concerned in the trial, and increase the costs. At what stage of the trial may witnesses be offered to the court? Regularly this must be done during the inquiry or informative proceeding. After the close of the inquiry (*expleto processu*, art.

[1] *Instr.* 1878, art. 15, *Quodsi nolint.*

[2] *Volentes effrenatam multitudinem testium refrenari* (c. 37, X., II. 20). Cfr. *Acta S. S.* II., 406.

29) or during the final pleading (which, according to the *Cum Magnop.*, art. 33, is *not parol* [*L'Ordinario*, arts. 33, 34] but in writing) the court, in our opinion, could not allow new testimony to be given, except it be satisfied that the new witness is a necessary and substantial one, and has not before been known as such to the party producing him. In this case the judge could demand of the producent the *juramentum malitiae*, an oath to affirm that he produces witness in good faith, not with fraudulent intent or through chicanery.[1] The same applies in case of re-examining a witness after publication. No more than three terms should be allowed to introduce new witness. How many times may the same witness be put on the stand? Canonists distinguish two cases: the witness will be examined either on the same matter and points as before, or on new points. In the latter case he may be called to testify as often as required or allowed by the auditor. In the former he may be re-examined as long as his former depositions have not been made known[2] either by the publication of the inquest or by a violation of the secrecy imposed upon the witnesses. To offer a witness for re-examination after his depositions have become known, makes the law suspect collusion and subornation. *Cross-examination*, properly so called, has no place in Canon law, as neither the prosecutor nor the attorney examine the witnesses, but only the auditor or the judge or some special commissioner. There is, however, what may be termed the quintessence of cross-examination, inasmuch as the accused may himself or through counsel request the auditor to re-examine the

[1] *Praestito . . . juramento quod . . . nec per dolum aut artem aliquam quartam productionem exposcat. sed quia quos desiderat de novo producere prius habere nequivit.* c. 55, X., II. 20.

[2] This is what the phrase *quum nondum testificata didicerint* (producentes) means. c. 46, X., h. t.

witnesses before as well as after the publication on certain points either of the issue, or of witness's competency, or of the testimony published.

4. *Examination of Witnesses.*

68*. "According to the *Instr.*, art. 18, the witness who is about to testify must be sworn (*sub juramento*), and that regularly before giving his testimony; to confirm by oath the depositions *already made* is allowable only when the judge was in doubt whether witness could be sworn at all, or for some other good reason. But if witness should refuse to take that oath his testimony is void." (*Droste.*)[1] A statement not sworn to is no evidence. The oath must be to the effect that witness will tell (or has told) the whole truth to the best of his knowledge, and nothing else (*solam et totam veritatem*). Hence it is called in law *juramentum veritatis.* If necessary, the oath may also contain the promise of secrecy (*j. de secreto servando;* art. 18). This, we suppose, will generally be the case,—with women always; by the very nature of the inquisitorial procedure it certainly will be advisable in all cases. The oath is to be administered by the auditor (commissioner), who should first call the witness's attention to this duty of telling the truth, and to the nature and binding character of an oath. *Rota*, n. 663.

The examination of witnesses must be conducted by the auditor. Even if after the close of the informative proceeding new witness is to be heard, it is generally done by the auditor, not by the bishop or his vicar-general. According to some, the fiscal procurator may be present.[2]

The *Instr.*, art. 17,[3] orders the witnesses always to be

[1] Axiom: *testis non juratus non probat.*

[2] AJP., XIV. 971, 35.

[3] Cfr. *Instr.* 1878, art. 11.

separately examined, otherwise the proceeding is void. This certainly implies that they must not communicate to one another either the interrogatories or their depositions before the publication of the process. It will greatly facilitate matters, if the auditor, who has already from the charge and the bishop's preparatory inquest some knowledge of the whole case and the persons therein concerned, will prepare for his private use a schedule of general and special interrogatories. They should be as clear as possible and capable of a definite and direct answer. The *general questions* are on the name, domicile or residence, condition or profession, age and parentage of the witness. "In order to test the witness's accuracy, veracity, credibility and competency, he may be examined as to his relations to either of the parties or the subject-matter in dispute. His interest, his motives, his way of life, his associations, his habits, his prejudices, his physical defects and infirmities, his mental idiosyncrasies, if they affect his capacity; his means of knowledge and powers of discernment, memory and description, may all be relevant."[1] However, great discretion and tact as well as charity, must guide the auditor in these things.—The *special questions* must refer to the *corpus delicti*, the crime or charge; they ought all to be material and relevant to the fact at issue. Witness may first state *in continuo* all that he knows about it; then he must be minutely examined on his own depositions, especially how, by what means and ways, he came to that knowledge. By this examination the auditor must ascertain how much of the testimony is of personal knowledge, or of hearsay or rumor, or of mere opinion and inference. Then other relevant questions may be put as to circumstances of place, time, persons, etc., not yet mentioned by witness. It is evident that these special interrogato-

[1] *Bouvier*, s. v. Witness.

ries will be quite different in one and another trial. There is, however, a rule which binds under sin and nullity of the trial. *Leading or suggestive questions are not allowed.*[1] They are those "which put into the witness's mouth the words to be echoed back, or plainly suggest the answer which the party wishes to get from him. In that case the examiner is said *to lead* him to the answer. It is not always easy to determine what is or is not a leading question. . . . Questions may be put to lead the mind of the witness to the subject of inquiry, and they are allowed when it appears the witness wishes to conceal the truth . . . or where from the nature of the case the mind of the witness cannot be directed to the subject of the inquiry without a particular specification of such subject."[2] This holds good also in Canon law. After examination the depositions of witness are read to him or by him; if he wish to correct some statement, he may do it then, but not afterwards. He will then sign his name to the depositions, or, if unable to write, he will make *his mark*, which must be attested by the clerk or some other person.[3] If he refuse to subscribe, the fact must be noted, together with the reason of it. Finally the record must be signed also by the auditor and the clerk.

[1] *Questiones suggestivae ac fallaces.* Cfr. *Rota*, n. 667: *Santi*, h. t. n. 43.

[2] *Bouvier*, s. v. Leading Question.

[3] AJP., xx. 88. xxxviii.—"Dopo essere steso gli si torni a leggere, e si passi in fine a farglielo sottoscrivere, ovvero in caso d'illeteratura segnare colla croce alla presenza di persona ecclesiastica, o di altri due testimonj," etc. Pius VII., *Post Diuturnas*, § 110.

5. Publication of Testimony.

69*. It is unnecessary here to repeat all that the commentators had to say on the conditions and solemnities required for the publication of the testimony. This publication consists in making known to defendant the names of the witnesses and their respective depositions. Now this, according to the *Instructio* (art. 32), as interpreted by the Council of Baltimore, n. 314,[1] is to be done only after the closing of the informative proceeding. When the *Instr.* says that for a full discussion of the issue (art. 26) and a proper defence the accused should know all the evidence against him (art. 27), it merely implies that the different arguments (art. 26, *coll.* 29) drawn from the testimony and other evidence to prove his guilt, must be clearly and distinctly set before him, but not the full depositions, much less the names of the witnesses. All this he will fully know when either himself or his counsel shall peruse not only the auditor's brief or abstract (*ristretto*, art. 29), but also the whole *procès-verbal* (*del processo*, art. 32) of all the preceding transactions. Here, indeed, we have the so-called *confrontation* of witnesses with the accused, which is considered by all an essential requisite of criminal justice.[2] "We distinguish, however," says our author, "between *personal* and *verbal* confrontation. By the former the witnesses are personally confronted with the accused in presence of the judge, and there obliged orally to repeat their testimony.[3] In ecclesiastical courts this takes place only in case of most grievous or capital offences.[4] Of itself it is not an essential requisite of

[1] The phrase *publicato processu*, in this n. 314, was explained by the Roman reviser in the parenthesis "(i.e. *communicato al defensore*)."

[2] S. C. Epp., 1 May 1851; 17 Dec. 1852. AJP., XIII. 50, 109 sq.

[3] They may in such case even be cross-examined in the manner indicated by *Instr.* 1878, art. 12.

[4] AJP., XIII. 50, 106; XIV. 973, 41.

canonical procedure; in fact it is nowhere enjoined, and generally will not be advisable.[1] The auditor has the discretional power to order it, whenever it appears necessary to him; the judge can never order it.[2] But the *verbal* confrontation is quite indispensable in ecclesiastical criminal procedure. It consists in this, that the names of the witnesses are communicated to the accused, and their testimony either read to him or laid before him for his inspection, as also the conclusions drawn therefrom by the fiscal procurator and the motions made thereon.[3] It cannot be omitted, nor can the accused, as a rule, be represented in this by attorney, except his personal attendance be impossible, in which case the attorney must have a special mandate, a general one will not suffice; moreover, the verbal confrontation must, if possible, still be accorded to the accused himself."[4] Some writers seem to maintain with *Rota*, n. 659, 715, that if defendant do not expressly acknowledge the testimony as competent and lawful evidence, the judge is bound not only to allow a verbal confrontation but even to re-examine the witnesses (*necessario repetendi et legitimandi sunt*) whether the proceeding be summary or not. Others, again, would throw out as irrelevant all the testimony gathered during the inquest, if witnesses be not again sworn in presence of defendant and re-examined during the defensive proceeding although it be a summary trial. These opinions we consider positively false. The whole tenor of the *Instructio* is against

[1] *Acta S. S.*, XV., 395.

[2] S. C. Epp., 4 Sept. 1834. AJP., XX. 467, XVI.—Whatever the meaning of this decree, we think that it is the judge more than the auditor who can order a personal confrontation. What *Droste* probably intended to say is that the confrontation should take place before the auditor, not before the judge himself.

[3] AJP., XIV. 937, 40.

[4] S. C. Epp., 26 March 1823. AJP., XIII. 50, 108; XX. 89, XIII.

them and rather conveys what *Pierantonelli*[1] unhesitatingly asserts: *Verum in praesenti Ecclesiae conditione non solum confrontatio sed ipsa nominis testium publicatio ut plurimum impossibilis est.* The same writer suggests that in order to enable defendant to challenge witnesses for the prosecution, it is enough to mention their names in general without stating what each one had testified (*dentur nomina testium confusa et separata a dictis testium*). If the interests of witness should demand it, his name may be withheld altogether. A full publication in the strict and rigorous sense of the law is not necessary for the validity of the trial, as long as the substantial evidence against him be made fully known to defendant. From this, however, we draw a most important conclusion: whenever the case is such that it would be inadvisable to publish a witness's name, it becomes an absolute duty of the court to inquire very closely about the competency and credibility of the witness, whether he be against or for the defence. The court in this case must by anticipation consider whether there be any solid grounds for a possible challenge of such witness.

Art. IV. Miscellaneous Evidence.

1. Expert Opinion.

70. Closely related to the testimony of witnesses is the opinion of *experts*.[2] If they merely testify to facts as observed by them they are simply witnesses, though their testimony would be especially valuable, their observation having been made with an expert knowledge of the matter. They may be, however, especially appointed by the ecclesiastical judge to examine certain matters and to give their expert opinion thereon. They must possess the

[1] Tit. 5, n. 22, 144. The *Acta S. S.*, xv., 395, say the very same.

[2] *Reiffenstuel*, l. II. tit. 19, n. 22; *Schmalzgr.*, ib. n. 20. *Santi*, tit. 20, n. 20, calls expert witnesses *testes qualificatos.*

qualities of a classical witness and, moreover, the requisite special knowledge, and must be sworn.[1] Their opinion is given in writing called the report. If they are orally examined they must sign their depositions. The accused has under certain circumstances the right to decline their testimony.

To make the matter clearer the judicial inspection[2] is often of advantage. In such case either the judge repairs with the clerk to the place where the offence was committed, or he orders portable things, instruments, etc., to be produced before him. He may also get information by an extrajudicial personal inspection; no clerk is then required. Such an extrajudicial information will often give a far better insight into the whole case.

2. Written Evidence.

71. Evidence in a criminal trial is frequently supplied by means of documents.[3] Persons who are in posses-

[1] *Cod. Just.*: "duobus insignibus mechanicis et architectis . . . ss. evangeliis positis definiantur ab architectis."

[2] Commentators in l. II. tit. 19.

[3] Commentators in l. II. tit. 22. *De fide instrumentorum. Rota*, n. 693 ff; *Smith*, n. 863 ff; *Henry-Harris*, part IV. Written evidence is also called *documentary*. "A document in this sense extends to any record whether expressed in writing or symbols, and no matter what may be the nature of the substance on which it is recorded. A gold watch with an inscription on it, or a tombstone, is a document" (*Robertson*, l. c.). This remark holds also in Canon law. See *Reiffenstuel*, h. t., *de sculpturis*, n. 221 ff. There is some difference among writers in using the terms public and private, authentic and genuine writing. *Authentic* means authoritative; i.e., a writing the contents of which are reliable and trustworthy, while *genuine* means that it is the same as written by its author, not spurious, forged, or corrupted. A document may therefore be genuine without being authentic. *Public* writings are those executed by public authority. Hence documents referring to private affairs are public writings, if executed by an official person recognized as such by the public authorities. *Private* is any writing executed by a person in his private capacity. It may now be easily understood that all public

sion of such documents must therefore, upon a demand by the court, deliver them, but the duty of the accused to produce documents extends no further than that to testify; he is therefore not obliged to deliver documents which may be evidence against him.[1]

For a document to serve as evidence, we must first examine whether it is genuine and authentic. Public documents must accordingly bear the name and title of the official issuing them, as well as his official seal. Private documents should be written in the presence of and subscribed by at least three witnesses who can write (*testes instrumentarii*). If the document bears the external marks of authenticity, the further question arises whether it is really genuine. The genuineness will, however, be presumed until called in question, when it must be proved either by the testimony of those who have signed it, or, if that is impossible, by a comparison with other documents, and if necessary by the opinion of experts. But to establish the authenticity of documents through witnesses and experts, the judge must act with the greatest circumspection. He must first ascertain whether the witness or expert is acquainted with the person whose instrument the writing is said to be, whether he has been in correspondence with him or only accidentally saw his handwriting, whether he knows it well and could now recognize it. He must then place that document among others of different authors, cover the signatures, and request the witness or expert, who professes to know the handwriting of the author in question, to pick it out. It

writings are authentic, and not *vice versa;* and, again, that a copy (*exemplum*) of a public document must be duly authenticated to become itself public and authentic.

[1] Except when they concern the rights of another party. Cfr. *Santi*, h. t. n. 14.

would be altogether wrong to show the document alone to the witness and ask him whether or not it be in the handwriting of N.[1]

72*. There are still some questions concerning written evidence not touched upon by our author, questions that may become important in criminal trials against clerics; e.g. when on a charge of familiarity the correspondence between the parties is offered in evidence; or when in a case of mal-administration the account-books or the church-records are produced in court; or when defendant charged with unlawful exercise of the ministry appeals to a written faculty which he has lost or thrown away. In such cases the main question will be how to establish or to disprove the genuineness, authenticity, existence, or loss of the documents, etc. Suffice it to say that all these points must be decided by witnesses mostly, either because they are attesting witnesses or parties to the contents of the writing, or because they have seen and read it, or know its handwriting, or have at least heard of its contents, etc. Parol evidence may also serve to interpret written evidence, to explain doubtful terms of the writing, to rebut presumptions arising from extrinsic or intrinsic defects, e.g. imperfect address, erasures, cancellings, interpolations, etc.; it may even defeat written evidence altogether on the ground of fraud or mistake. All this applies specially to private writings, though not exclusively. There are mainly two objects for which parol evidence may bear directly on written evidence; namely, either to establish or to deny, first, the genuineness or authenticity of the document; secondly, the truth of its contents. For a full treatment of the subject consult the *Commentators*, h. t., *Santi*, n. 15 ff.

[1] On the comparison of handwriting cfr. *Reiffenstuel*, h. t. n. 165, 599.

3. Circumstantial Evidence.

73*. "Facts may be proved in two ways: first, directly and immediately by the testimony of witnesses and documents; or, secondly, indirectly by means of a greater or smaller amount of indications, conjectures and presumptions that cannot be rationally explained except on the supposition of the fact in question."[1] This latter kind of evidence is called *presumptive* or, because generally furnished by the circumstances of the case, *circumstantial*.[2]

The rational basis of such evidence lies in the connection of the facts or circumstances known and proved with the fact at issue. That connection is the ground on which the inference is made from the facts known to the unknown or at least unproved. Hence "a presumption is more or less strong according as the fact presumed is a necessary, usual or infrequent consequence of the fact or facts seen, known or proven." In the first case the presumption is called *violent* (*vehemens*, *violenta*, *gravissima*), because the indications are so strong that they *morally force* the corresponding inference upon the mind. When, however, the indications are not so strong, but still of such a nature that, judging by the general experience of man, it would be unusual

[1] *Acta S. S.*, VI. 422.

[2] The *C. J. Can.* treats of it in l. II. tit. 23, "De praesumptionibus." Consult *Commentators*, ibid.; *Smith*, n. 874 ff.; *Rota*, n. 683 ff.—Canonists always distinguish between *praesumptio* and *indicium*, the former being the effect of the latter. A *presumption* is a reasonable conclusion upon some fact at issue drawn from indications or circumstances generally connected in reality with such fact. An *indicium* (indication, mark) is a notable sign that may in some doubtful matter lead to the truth. The two terms, however, are often used indiscriminately on account of their close connection; so much so that even the qualifying terms *vehemens*, *gravis*, *temeraria* are equally applied to presumptions as well as indications.

and extraordinary if the inference were not true, the presumption is *strong* and weighty (*gravis, probabilis, magna*). Finally, a presumption is *slight* and rash (*levis, temeraria*) when the facts known do not justify an inference to the matter in doubt, so that it would indeed be unusual if such inference were true. Such an unreasonable presumption, evidently, is no evidence, while a strong presumption gives half-proof; so does a violent presumption against the accused in a criminal suit, although in a civil case it is full proof.

Another famous division of presumptions is that in legal (*juris*) and natural (*hominis*). The *first* are those where the law itself draws the conclusion from certain facts. Hence, as soon as these are proved, the judge needs only apply that conclusion. They are of two kinds, *conclusive* (*juris et de jure*), against which no direct proof is admitted, for they are as firm as the law itself; and *rebuttable* (*juris simpliciter*), which may be set aside by contrary proof. *Natural* presumptions we call those where the law allows indications or circumstances to exert their natural influence on the judge's (*hominis*) mind, and leaves it altogether to himself to make the inference that he considers warranted by the facts already proved. The same distinction is sometimes expressed by the terms *presumptions of law* and *presumptions of facts*. The former are enumerated by the commentators. The effect of legal presumptions is that they are presumed to be true until the contrary is proved, and that consequently the burden of proof on this point is thrown on the party against whom the presumptions stand.

With regard to the relative weight of conflicting presumptions canonists generally lay down the following rules:[1] 1. Legal presumptions are stronger than natural, and special presumptions stronger than general ones.

[1] Cfr. *Santi*, h. t. n. 13.

2. Presumptions derived from the ordinary course of nature are stronger than casual ones. 3. Presumptions that stand for the validity of an act are favored. 4. Presumptions in favor of the accused are preferred.

It has been asked whether Canon law allows a conviction in a criminal trial on purely circumstantial evidence. It does, and there is no reason why it should not when the degree of that evidence is such as to establish a moral certainty of the crime. Yet canonists are nearly unanimous in saying that in such a case the judge should not impose the full punishment of the criminal code, but, as no direct proof of the crime was given, should modify the sentence according to the degree of the evidence.

CHAPTER III.

DEFENSIVE PROCEEDINGS.

Art. I. Terms and Exceptions.

74*. Although the various special proceedings now to be mentioned may also be used by the prosecution, still they are principally means of defence and are therefore called by canonists the weapons and shields of the accused.

By *judicial terms* we understand here such intervals of time as are granted by a court for a better, more thorough and perfect execution of some judicial act.[1] The whole teaching of Canon law regarding terms is based on two conditions. As applied to the criminal trial they are these: *first*, the public welfare as well as justice and

[1] As the transaction itself is by such terms necessarily delayed, Canon law treats of them under title 8, *De Dilationibus* (l. II.). Commentators, ancient and modern, use the words indiscriminately. Cfr. *Acta S. S.*, XV. 393 sqq.; *Pierant.*, tit. 5, n. 18 sqq.; *Smith*, n. 1078 ff.

equity demand that the accused, if guilty, shall not without cause long remain unpunished; or if innocent, shall as soon as possible be discharged. Hence the law abhors unnecessary, unreasonable, and especially frustratory or fraudulent delays; no court may grant terms for such purpose; and if more than two or three terms for the same object are demanded without urgent and evident cause, the petitioner must make affidavit that he asks without fraudulent intent (*jur. malitiae*). *Secondly*, it is generally impossible for the parties, especially the defence, to have all the material ready at hand that will be necessary to prove their own allegations or defeat those of the opposition. The judge himself may often be unable with all the evidence, *pro et contra*, before him to form a certain judgment at once without further consideration. Justice therefore demands again that whatever time may be required for these purposes shall be granted by the court. On the strength of these two principles canonists maintain that most of the former *legal terms*, i.e. those established and expressed by the Corpus J., have become *arbitrary*, i.e. dependent on the discretion of the court, at least as regards their length. Whether a short or long, a simple or a peremptory term shall be granted, will depend on the nature of the case and the circumstances of persons, places and times. No one doubts that with our improved means and ways of communication terms of three, six and even nine months would be unwarrantable delays; yet notwithstanding "lightning expresses" and "fast mails" and "ocean racers" judicial delays will be unavoidable. To grant all the time required, is a postulate of justice (*substantialis j. regula*) also in summary trials; and even here, if the term given by the judge should be found insufficient, it may be extended (*prorogation*) as far as the business requires.

75.* With regard to the different kinds of terms, we may for our purpose mention principally five.[1] *Citatory* is called the time stated in the summons when the accused is to appear in court; while the time given him to deliberate whether to plead guilty or put in a declinatory plea or file his answer and let the case be tried, is called the *deliberative* term. Canonists observe that when the charge was made known to the accused in the citation in such manner as to enable him to prepare his answer, no special deliberative term will be granted.

Query. Does our Instruction admit a deliberative term? We certainly think it does. There is nothing in it to prove such an exception from the general law. The examination mentioned in art. 25 does not necessarily refer to the first appearance of defendant, but to the time when, having decided to contest the charge, he comes to answer.

Probatory terms are those given to the prosecution as well as the defence to bring in their evidence, the one to support the charge, the other his answer, both to prove their exceptions (arts. 28, 33).[2] These terms will generally be granted when new testimony is to be produced.

A *definitory* term is the time after the conclusion, when the court reserves judgment till another day. There is a marked difference in this regard between the L'*Ordinario* and the *Cum Magn.* The former (art. 35) seems to allow no such terms, for the simple reason that the court was allowed sufficient time (by art. 33) to consider the whole case and form a judgment previous to the final pleading in court (art. 34). But as according to the latter instruction the final pleading is purely in writing to

[1] Cfr. *Santi*, h. t. n. 3 sqq.

[2] These comprise the famous *dilationum termini*, 1° *ad articulandum*, 2° *ad dicendum contra articulos*, 3° *ad producendum omnia*, 4° *ad dicendum contra producta*. By *articuli* or *positiones* Canon and Civil law mean the particular specifications of the statement (charge) and the answer.

be handed to the Ordinary (art. 33), he will appoint a day for judgment only after having fully informed himself of the merits of the case.

An *executory* term is a delay granted before the sentence is to be executed; a respite. *Per se* there are no such terms in criminal cases, except one choose to give this name to the time pending an appeal *in suspensivo*.

The effect of a judicial term is that during that whole time the court cannot proceed in the particular point or matter for which the delay was granted, and that after the lapse of the term, if peremptory, the court may and ought to proceed, although the petitioner has not yet completed his work.

According to the commentators the term must be counted from the day when petitioner is officially notified of it. This, however, supposes that the delay granted is expressed by a certain number of days or months. It may, therefore, be advisable that the judge specify in the writ of delay a certain definite day (*terminum*) of such month and year as the last day of the term. Still the day when the writ was served should be recorded.

76. *Exceptions* are the strongest weapons of the defence. They are not mere objections to some asertions made in court, but regular pleas by which the defence tries either wholly to defeat or at least to retard the prosecution. The first are called *peremptory*, because if sustained they positively finish the matter; the prosecution must be stopped and the case dismissed. Such would be the case if the accused prove that what he is charged with is no crime at all, or that there is no cause for action (pleas *in bar*). *Dilatory* pleas only delay the proceedings without defeating the whole cause. Such pleas may be directed against the judge himself, challenging him with being incompetent in the case (plea *to the jurisdiction*) or as being suspect of partiality (*recusation*, see n. 77). These are called

declinatory pleas, because the accused declines to have his case tried by that judge or court. Exceptions may also be taken against the testimony on three grounds; first, against the witnesses themselves as incompetent to testify. This plea, however, may stand over till the conclusion. For it may appear that witness's testimony is to be thrown out as irrelevant, which renders it unnecessary to support or contest the plea. Or the plea may be to the examination of the witnesses, showing that they were not sworn, or were examined in the hearing of one another or in a captious and misleading manner, etc. Again, exception may be made to their depositions as irrelevant, conflicting or variant, that their evidence is very light: the same may be objected against circumstantial evidence, and moreover that it is unsupported by direct evidence. Pleas against written evidence are to the genuineness and authenticity of the documents or to the credibility or competency of the writer. Finally, there are pleas to the proceeding itself in its different parts as irregular, illegal, void, etc. Special mention is to be made of the plea of an *alibi* (*probatio negativa coarctata*). By it the accused may show that at the time when charged with having committed the crime in a certain place, or with certain persons, or before certain witnesses, he was in another place or in other company, or that they themselves were in other places, etc.

While Canon law grants to defendant the right of valid exceptions even in a summary proceeding,[1] it also strictly obliges the court to strike out all *sham pleas* (*exc. frivolae, frustratoriae*) entered only for the purpose of delay (*malitiosa procrastinatio*).

It is unnecessary to say that the prosecution may also enter exceptions against the statements or pleas of the defence. But how long such juridical altercations may

[1] *Rota*, n. 730.

continue lies in the discretion of the court.[1] The same must also decide whether a plea entered has been sustained by the pleader or not.

With regard to the *time* when pleas should be entered, no particular time can be assigned in a summary proceeding, except that it must be done before the conclusion of the trial, or if new grounds for an exception were discovered only after that, at least before the sentence; after this there remain only the appeal and the plea to the execution.

The *order* in which to enter different pleas is evidently the logical one; hence, 1st, to the jurisdiction of the court; 2d, to the person of the judge (recusation); 3d, to the action itself; 4th, to the proceeding; 5th, to the evidence. Finally, the plea itself should *in form* be clear, distinct and precise, without argumentation, stating briefly and directly the exception in all its legal force.

Art. II. Recusation.

77. There are cases in which the ecclesiastic holding the office of judge in a criminal proceeding is not unfit for the same; nevertheless the parties, especially the accused, have no real confidence in him, because they fear that his love of justice may, not by any fault of his, but through certain influences be impaired; they consider the judge to be *biased*, as it is called in jurisprudence.

Following the Roman law, the sacred Canons also gave to the parties the right to challenge (*jus recusandi*) the judge, if they should have any apprehension of his being biased or prejudiced against them.[2] Many special

[1] The terms *replicatio, duplicatio, triplicatio*, etc., of canonists are about the same as *joinder, rejoinder* and *surrejoinder* in Common law.

[2] Hence recusation is not a plea to the jurisdiction or competency of the judge (*exc. jud. inhabilis*), but rather to his person, a personal chal-

grounds for a challenge are enumerated in law, but not all, since the matter is of such a subjective and personal nature. Among them are consanguinity or affinity,[1] perhaps to the fourth degree; enmity,[2] friendship,[3] familiarity,[4] fellow-membership with some of the parties in the same society;[5] having acted previously in the same or similar cause as counsel or advocate;[6] the subordination of the judge under one of the parties,[7] or sometimes *vice versa*.[8] Recusation is only a dilatory, not a peremptory exception, and must be made in writing[9] to the judge himself, before the public pleading (*contestatio delicti*) begins.[10] After that time the recusant can enter this plea only upon making an affidavit that he had no knowledge of the reasons for

lenge for cause (*exc. jud. suspecti*). Recusation may be made not only against a judge-delegate, but also against the Ordinary (*Rota*, n. 732); not only against one of the associate judges, but against the whole bench. *Commentators* deal with the subject under tits. 22, 28, l. 11. See an interesting case in *Acta S. S.*, XVI., p. 328.

[1] c. 36, X., II. 28.
[2] c. 15, § 2, C. 3, q. 5.
[3] c. 25, X., I. 29.
[4] c. 4, X., II. 6.
[5] c. 35, X., I. 29.
[6] c. 36, X., II. 28.
[7] c. 2, X, II. 6; c. 25, X., I. 29.
[8] c. 17, X., I. 29. All these different reasons are indicated by the *Gloss* in the following verse:

Subjectus, dominus et commensalis, amicus,
Incola, canonicus, ac attingens, inimicus,
Si causam similem delegatus tueatur,
Vel si patronus fuit olim, tunc amoveatur.

[9] The bill must clearly and in detail state the reasons or grounds upon which the judge is distrusted, *quia judicis recusatio ad suggilationem existimationis et quodammodo injuriam illius pertinet. Schmalzgr.*, h. t. n. 134.

[10] It is the nature of a recusation that it must be made before the person thus challenged begins to exercise his jurisdiction. To let him do this would be to admit his authority. Hence a recusation of the auditor must be made as soon as the recusant is cited by him. To accept his summons is to acknowledge his right to try the case.

the challenge before,[1] or in case the grounds of the challenge arose only afterwards.[2] The sentence passed by a judge who might have been effectively recused but was not challenged at the proper time, is not void, at least on this plea.[3]

78. The judge who is challenged will himself examine the grounds and the evidence upon which the recusation is made. If he see at a glance that the reasons for his recusation are good, he ought to retire at once from the trial. But if he clearly perceive that the suspicion is entirely unfounded,[4] or if within the reasonable time that must be given to the recusant to establish the challenge,[5] no proof or any weighty reason for challenge can be furnished, he himself enters without further delay upon the trial of the cause.[6] A papal delegate, as well as any judge who has the right to delegate another in his place, may commit the trial to another before the plea of recusation is put in, but not after this.[7] In all cases where the plea is not manifestly a frivolous one and the parties cannot agree with the judge as to his exclusion, we must see first whether the judge officiate individually (judge sole) or *collegialiter* (j. associate), and whether he be Ordinary or delegate.

In a college of more than two judges, the unchallenged judges decide the case of their colleague, provided this

[1] c. 41, § 1, X., II. 28. [2] c. 28, X., I. 29.

[3] S. C. Epp., 2 Aug. 1004. AJP., XX. 85.

[4] In which case the recusation is called *frivolous* and belongs to the class of sham pleas.

[5] AJP., XIII. 52, 129.

[6] c. 2, in 6°, II. 15; cc. 41, 61, X.. II. 28.

[7] After the plea has been entered, but before it is admitted and indorsed by the triors, the judge may delegate another if the recusant consent; but even with such consent he could no longer delegate after the recusation has been upheld by the arbiters. c. 5, in 6°, I. 14.

right was not withheld from them by being reserved to the bishop himself. If they cannot all agree in their opinions, the majority decides. When only two judges are to try the cause, the delegate who was not challenged can only then alone decide on the objection against his associate, if they were delegated with the clause that if both could not undertake the trial, one alone of them should proceed in the matter.[1] In case of a challenge against a delegated judge-sole, the delegator decides. When the vicar-general (official) is challenged, the bishop decides, although no appeal lies to him.[2] At present the chapter can no longer decide upon the recusation of the vicar capitular, notwithstanding former practice.

79. Where, however, none of the above cases exist, but where the challenge is made against the bishop or the vicar capitular or any other judge ordinary, there the parties, or the judge and his recusant, are to choose one or more arbiters[3] who do not reside too far away, and who of course must be clerics. These triors will decide whether the recusation be made on legal grounds, and whether these be clearly proved. If the parties cannot agree as to the arbiters to be chosen, then each party shall choose one. If the arbiters themselves cannot agree, they in turn will choose a third one in order that a decision may be obtained by majority of votes.

Should the arbiters declare that no legal reason for challenge exists, or that the one alleged is not proved, the judge may proceed in the cause.[4] But if a party is successful with the recusation, the judge so recused must

[1] c. 4, in 6°, I. 14. [2] Ibid.

[3] c. 10, X., II. 2. These arbiters are *arbitri juris*, not *a. compromissarii*, nor mere *arbitratores*. Their power and proceeding is strictly juridical, and their decision is law and can be reversed only on appeal to a higher court. Cfr. l. I. tit. 43, "de arbitris." In Common law arbiters in case of challenge are called *triors* (Bouvier, s. v.).

[4] c. 61, X , II. 28.

refrain from any further judicial action; for, says the Canon,[1] "common-sense teaches that suspected or inimical persons cannot act as judges." In this case another judge should be appointed by the higher court rather than that it should itself try the cause and thus deprive the parties of an appellate instance, if an appeal in the case should afterwards be desirable.

80. A plea of recusation or challenge may also be entered against the chancellor for the same or similar causes as against the judge.[2] Some writers maintain the same in regard to the clerk or secretary.[3]

CHAPTER IV.

PROCEEDING IN CONTUMACY.

81. By *contumacia*[4] is understood an obstinate disobedience, and by *contumax* the person so disobeying. Here, however, we call contumax the person who being accused and summoned to appear for a hearing, refuses to obey the order of the judge.[5] In the old law censures

[1] c. 14. § 1, X., h. t.

[2] S. C. Epp., 2 Aug. 1804. AJP., xx. 85.

[3] S. C. Epp. Imm., 22 June 1660; 13 Sept. 1692. And we are inclined to add the fiscal prosecutor and the auditor to the list. In these cases the judge himself will naturally have to decide whether the recusation is to be upheld or dismissed.

[4] Cfr. *Commentators* in l. II. tit. 14; *Pierantonelli*, tit. v. n. 9 sqq.; *Bouix*, II. p. 164 sqq.

[5] This is only one kind of contumacy. There are, however, others expressed in the verse:

Non veniens, non restituens, citiusque recedens,
Nil dicens, pignusque tenens, jurareque nolens,
Obscureque loquens, isti sunt jure rebelles.

Hence *Grandclaude* defines contumacy as disobedience against the judge

were indeed passed upon such contumacious persons, to compel their appearance; but the *Tridentinum* allows the use of censures now only when a person convicted of a grievous offence does not submit to the execution.[1]

While Canon law, following the Roman, requires in general one peremptory citation or three simple ones, the Instruction, art. 24, holds the accused as contumacious, if after one simple citation and another but peremptory one he refuse to appear before the auditor without being lawfully excused or hindered from obeying the summons.[2]

The proceeding in case of contumacy is instituted on motion of the fiscal, who will so move after the first ineffectual citation, and again after the peremptory one. When the contumacy is clearly proved, a defender of the contumax is officially appointed by the court, and a term fixed for the trial of the cause.[3] At the appointed time the court will proceed in the case[4] against the accused in his absence as if he were present. Being wilfully absent he renounces the privilege of self-defence, and by disobeying the court creates the suspicion of guilt. Yet his disobedience does not prove his guilt, and to be convicted the proof must be just as complete as if he

legitime vocantem vel quid fieri praecipientem. With regard to the citation canonists distinguish between *true* and *fictitious* contumacy. The first is when the person simply disobeys the summons received; the other, when he maliciously prevents the summons from being served on him. The consequence is the same in either case.

[1] S. xxv. c. 3. de Ref.

[2] If the accused cannot or need not appear, he must notify the judge by stating the reasons. He may do it by an authorized messenger or by registered letter. *Pierant.*, l. c. n. 12. Otherwise he will be presumed contumacious (*c. praesumpta*). If he proves afterward that he had good reasons for disobeying at the time, he is said in Canon law *purgare contumaciam*, a phrase still used in Common law—"to purge the contempt of the court."

[3] 13 Apr. 1818. AJP., xiii. 47, 74, and xx. 714.

[4] Even to the final judgment which will be given *in default*.

were present; to be considered contumacious is not the same as being pronounced guilty.[1] The contumacial proceeding differs from the regular proceeding only in omitting those acts which require the personal action, or at least presence, of the accused,[2] as examination, confrontation, self-defence, etc. The punishment to be imposed in case of guilt is that fixed by law, except it be capital punishment, to which in Canonical law degradation is compared.[3] This, therefore, cannot be inflicted in a contumacial proceeding, but deposition, removal and other canonical punishments can.[4] The person proceeded against as contumacious may afterwards demand a new trial, if he can prove the former to be void on account of a falsely presumed contumacy. After the lapse of ten years, however, a dispensation from Rome for that purpose will be necessary.[5]

CHAPTER V.

THE SENTENCE.

82*. Sentence is the decision or judgment of the court upon a criminal issue tried before it.[6] Judgments are

[1] Cfr. C. Pl. B. III., n. 313.

[2] The *Acta S. S.*, XV. p. 393, consider it fair and wise on the part of the judge to inform the contumax of the result of the trial before giving sentence, especially if the accused had not before been acquainted with the particulars of the charge against him. Such "grace" (*gratiam fecerit ei benignitas judicantis;* 24, X., 1. 29) is allowed by the canons.

[3] *Rota*, n. 761 maintains the same of excommunication.

[4] 13 Apr. 1818. AJP., XX. 714.

[5] May 1715. AJP., XIII. 47, 75.

[6] *Commentators* in l. II. tit. 27, "de sententia et re judicata;" *Pierant.*, l. c., n. 29 sqq.; *Rota*, n. 737 sqq. The Latin term *sententia* means judgment generally whether in civil or criminal cases, whereas the English *sentence* is more commonly limited to criminal judgments.

either *interlocutory* or *final.* The former are given in the middle of a cause upon some plea, proceeding or default which is only intermediate and incidental, and do not finally determine or finish the suit, like the latter, which at once decide the main issue and thus put an end to the trial before the same court. Some interlocutory judgments may stop any further proceeding and therefore be compared in this regard to final judgments (*vim sententiae definitivae habent*), e.g. judgment in favor of a plea in bar. An interlocutory judgment differs from a final one also in that it can be recalled or reversed by the judge at any time during the trial, in that it may be given orally provided it is recorded by the clerk, and in that no appeal can be taken from it, except it have the force of a final judgment.[1]

83*. The requisites of a legitimate sentence are external as well as internal. The external refer to the time (not on holy-days nor at night), the place (not *in loco sacro*) and conditions (in writing; also having summoned defendant to hear judgment, which may, however, be given in his absence).

Of the formal or internal requisites the author says: "The judge must not give sentence in haste, as if it were a prejudice formed already during the trial, long before the final discussion; but with deliberation, after having most carefully weighed the arguments for and against the accused. He must render judgment in his official character as judge, and therefore not allow himself to be led by any extrajudicial opinions formed outside of the regular proceeding, nor by any personal feeling, but notice only the evidence recorded in the acts, and take into consideration what was done before him as judge; in a word, his decision must be a judicial one, and, as far as it lies within mere human power, strictly just. To obtain this is the

[1] *Bouix*, II. p. 224 sq.

object of the whole proceeding. By the sentence the judge must either convict or acquit defendant. With regard to the punishment the sentence of condemnation is either merely declaratory, declaring that delinquent has at the very time when committing the criminal act incurred the punishment previously threatened or sanctioned either by the law or by the judge; or it may be actually or properly condemnatory by determining and imposing the penalty only then." If corrective measures in the same matter have already been taken against defendant, the judge may make allowance for it in the penalty now to be imposed.[1] The reasons for the verdict, if condemnatory, must be clearly expressed,[2] as well as the canonical penalty to be inflicted (*Instr.*, art. 35). It is a privilege of the Roman Congregations not to state the reasons of their decisions.[3]

Judgment must be for acquittal whenever defendant has not been fully convicted of the charge. No mere probability, however great, will justify the judge to condemn the accused. Formerly, if the court was not satisfied as to the innocence of the accused, but yet had no sufficient evidence to convict him, the sentence would be *non est repertus culpabilis ex hactenus deductis* or *stantibus rebus prout stant* or *ob probationum defectum.* By such an acquittal defendant was liable to be called up at any time by the same court for another trial on the self-same charge before that sentence became *res judicata.*[4]

[1] This, however, should be stated in the judgment.

[2] *Santi*, h. t. n. 11; *Rota*, n. 737. The judge must be very careful not to set forth any reasons not fully supported by judicial evidence or giving cause for legal exceptions.

[3] AJP., XIII. 53. 135.

[4] The *C. J. Can.*, h. t., treats also of the *res judicata.* This phrase means that the judgment given by a competent court on some issue has become absolutely binding and conclusive; the cause is definitely terminated and nothing more can be done in the matter. Hence the axiom in law that *res judicata pro veritate accipitur;* no appeal or objection or recourse

Droste maintains that at present such a qualified acquittal is no longer customary, but exclusively reserved for case of murder.[1] Hence nowadays such sentence should be by the clause *ex capite innocentiae* or *simpliciter non repertus culpabilis*, by which defendant is acquitted once for all as *non ulterius molestandus*.[2]

CHAPTER VI.

VARIOUS MATTERS.

84. According to the *Instructio* the procedure is altogether a written one. The depositions of witnesses and of the accused are immediately reduced to writing. As each witness and the accused are examined separately and alone by the judge, it appears but just that the judicial acts performed by him from the citation to the sentence be recorded in writing, in order that he be under the control of the accused as well as of the superior court. If the recording is entirely omitted, the proceeding is void. The Instruction[3] at the same time recognizes the advantages which parol proceeding possesses on account of its direct-

against it will be listened to. Only the Pope (*princeps*) can *ex speciali gratia* grant a new hearing in the case. *Res judicata*, as the civilians say, is of such a legal strength *ut de ente faciat non-ens, de falso verum, et de albo nigrum* (*Reiffenstuel*, h. t. § IV. n. 105 sqq.). According to Canon law the condemnatory criminal sentence (verdict of guilty) never becomes *res judicata* in the sense that the convict would be debarred from having the sentence reversed at any time, when he is able to establish his innocence. But an acquittal does, and becomes a bar to another prosecution on the same charge.

[1] He refers to a decision of 11 Sept. 1804 in the AJP., XIII. 53, 137, XX. 86, XXXIV.

[2] S. C. Epp., 11 Sept. 1818. AJP., XX. 456; *Rota*, n. 743. See also *Stremler*, p. 163 f.

[3] *L'Ordinario.*

ness. Hence the accused may defend himself not only in writing, but orally too; his counsel, after filing the written defence, is not prevented from making an oral address; finally, the fiscal prosecutor also may deliver his address orally (arts. 34, 35). An oral address of the defender in addition to the written defence is not usual in the procedure of the Roman Congregations,[1] though in criminal cases exceptions are sometimes allowed.[2]

Counsel of the accused may cause the defence to be printed and thus presented to the judge without losing the right of oral argument.[3] Before causing it to be printed, however, he must have the *imprimatur* of the court; the latter also determines how many copies shall be printed, takes the copies in charge, distributes them among the judges, and gives a copy to the defender. If, however, the court requires certain passages of the paper to be eliminated before printing, and if, on the other hand, the defender will not submit thereto, then the court must send the manuscript to the S. C. of Bishops at Rome, who will decide the matter.[4]

85. The *sittings* and transactions of ecclesiastical courts, even for the purpose of rendering judgment, are as a rule not public.[5] Our Instruction does not directly for-

[1] 1 Dec. 1732. AJP., XI. 791, 289. [2] AJP., XX. 164, XXIII.

[3] S. C. Epp., 3 Jan. 1820. AJP., XIII. 51, 120.

[4] S. C. Epp., March 1858. AJP., XIII. 1076; XX. 168, XXII. This paragraph remains *eruditionis causa*. We believe it to be the intention of the *Cum Magnopere* to keep out from the proceeding any regular *parol* pleading either on the part of the fiscal procurator or on that of defendant. The charge as well as the defence must be in writing. When the *Acta S. S.*, XV. 395, say that the defence may not be handed to the judge in print (*typis*). because art. 32 expressly mentions a written paper (*scriptis foliis*), we consider such reasoning hypercritical. In the two Instructions of 1878 and 1880 the term *in scriptis* is evidently not opposed to *typis*. but to *verbis* or parol pleading. To what class would the *Acta* consign the type-writer's work, to type or writ?

[5] AJP., XIV. 973, 41.

bid publicity; but that it contemplated only secret proceedings is shown by the fact that the witnesses (arts. 8, 18) as well as the defender (art. 32) may be sworn to secrecy. It is advisable, in the interest of the trial itself, to prevent publicity at least of the offensive proceeding; but to avoid any possible scandal it is best that the whole proceeding be secret.

The *language* of the court is to be the vernacular; the witnesses are to be examined in the language in which they are fluent; in case of necessity an interpreter is to be called, who must however be sworn. In the last century the questions were still put in Latin and then repeated in the corresponding vernacular. But the custom was abolished in 1800 by Pius VII.[1]

As a *place* of holding court may serve the building erected for that purpose, the bishop's or priest's residence, or any other place enjoying ecclesiastical immunity.[2] But it is also allowable and valid to perform all criminal jurisdictional acts, to examine witnesses, to write the acts, nay, even to give judgment, in any other place, whether exempt or not, provided it be not *sacer* in the canonical sense.[3] The auditor may examine witnesses in hospitals, convents, or in privileged places, when the witnesses are not allowed to leave these places.[4] Parochial records and documents may also be examined in the church.[5]

As regards the *time* of the proceeding, the judicial days, the terms must not be set or held upon Sundays and Holy-days.

[1] Cst. "Post diuturnas."

[2] S. C. Imm., 3 June 1828.

[3] S. C. Imm., 21 Jan. 1821; 14 July, 1830.

[4] S. C. Imm., 9 June 1828.

[5] S. C. Imm., 26 Sept. 1823. See these and other documents on the subjects in AJP., XIII. 48, and *De Montault.*

SECTION II.

THE CANONICAL PRACTICE.

CHAPTER I.

EXTRAJUDICIAL ACTS.

Art. I. Canonical Admonitions.

86*. *Observation.*—The subject and arrangement of the present chapter require a few explanations. The author, we are convinced, has fallen into a grievous mistake by making the *monitio canonica* a strictly judicial proceeding as distinguished from the extrajudicial or paternal admonition. He was probably led to it by confounding an official and formal or legal proceeding with a judicial one. Moreover, with him the *monitio canonica* seems to be the same as the *praeceptum*, another mistake which may have arisen from confounding such *monitio* with the *monitorium* frequently mentioned by canonists, and which corresponds to a mandatory writ of the court or a public episcopal edict commanding something under commination of excommunication.[1] To guard against these mistakes we shall in this article treat of canonical admonitions, whether paternal or legal[2] (art. 6), and in

[1] Cfr. *Ferraris*, s. v.; *Collet*, de censuris, ap. *Migne*, Curs. Theol. Compl. XVII. p. 144 sqq.

[2] We fully agree if some one prefer to call this legal admonition the canonical one *par excellence*, yet so he do not deny the official or canonical nature of the paternal one. In this sense we read C. Pl. B. III. n. 309. Cfr. *Stremler*, p. 206 ff.

the next of canonical precepts or injunctions, as of extrajudicial although assuredly official and jurisdictional proceedings. Again, the author seems to restrict the use of admonitions and injunctions too much to cases where a crime or at least a delict has already been committed. Now we are far from denying what is held by every one; viz. that even where the bishop has positive and certain knowledge of a transgression of the law, he is still at liberty according to his good judgment, prudence and charity, not to proceed at once to a judicial trial, but to try admonitions and salutary extrajudicial precepts, or even light corrective penances. This discretion seems to be explicitly granted by the *Instr.*, art. 3. Nay, even if a cleric were convicted by regular trial, the object of the sentence might be some one of those extrajudicial acts; e.g. an official reprimand, a special injunction the privation of some privilege, some particular penance, or the spiritual retreat.[1] Still the *Instr.*, art. 2, clearly teaches that the main object of those extrajudicial acts is to *prevent* transgressions by removing their occasions and proximate causes. In fact, the author acknowledges as much with regard to the paternal admonition. The Instruction, however, makes no such restriction; nor do canonists.[2] But they allow the bishop to make use of these means also, when he has some well-founded suspicion (*indicia haud levia*) or pretty good though uncertain evidence (*semi-proof*) of some delict.[3]

[1] Cfr. *Rota*, n. 613.

[2] *Acta S. S.*, XV. 379; *Pieranton.*, l. c., n. 5, 13.

[3] Cfr. the lucid exposition by *Pierantonelli*. tit. 3. n. 15 sqq The more we read the more it appears to us that it is a serious mistake to confound our canonical admonitions here spoken of with that famous *trina monitio* which must be made before an ecclesiastical censure, especially excommunication, can be inflicted as a corrective (*medicinalis*) punishment. We think it equally false to simply apply to our admonitions what canonists require for that one. Such writers forget that what holds in a special case does not thereby apply universally. On that *monitio* see a full exposition in

Finally, it seems unnecessary to say that these canonical admonitions may, according to the different circumstances and needs of the case, take the form of advice and counsel, warning and caution, or of correction, rebuke, and reprimand, in a milder or severer manner.[1]

87. The remote condition for canonical admonitions is either a delict committed by some cleric, or such mode and habit of life as is inconsistent with the dignity and decorum of clerical orders, or a conduct which is detrimental to any efficient pastoral work, or, finally, such voluntary occasions that may lead him to scandalous sins. All these are sufficient grounds for the bishop to proceed extrajudicially against such a cleric, as soon as he is sufficiently informed of their existence. This knowledge the bishop may obtain in different ways: by information from ecclesiastics or laics; from superiors or subjects of the offender; through complaints from individuals or from a whole congregation; or also by immediate personal observation especially upon visitations. How he actually obtains it in each individual case is, therefore, merely a question of fact. Yet the bishop may not proceed at once upon such information. He must first inquire into the truth of it,[2] or, as the *Instructio* says, institute a summary inquest (*summaria facti cognitio*, art. 5). The matter of the fact is to be determined very simply and without any formality; in many cases the fact is

Collet, l. c., p. 46 sqq.; a shorter one in *Pierantonelli*, tit. 6, n. 15 sqq. *Commentators* may be consulted on canonical admonitions under tit. 1, l. v., where they speak of the evangelical denunciation and the consequent duty of the bishop to proceed to paternal corrections. See *Schmalzgr.*, tit. c., n. 148.

[1] *Corripiantur itaque a praepositis suis subditi fratres correptionibus de caritate venientibus pro culparum diversitate diversis, vel minoribus vel amplioribus.* c. 17, C. 24, q. 3.—In accordance with the foregoing remarks we have changed some of the author's assertions in the following two articles, others we have omitted as too diffuse.

[2] c. 31, X., v. 3.

clear from the very beginning, as when the bishop himself notices reprehensible acts or a condition of things that is to be censured, for instance, disorder in the records or accounts of the church; in others, again, the proof is more difficult, and the bishop must examine witnesses and experts. But such examination must not be made in public or in judicial form, as any judicial proceeding must be carefully avoided.[1] In ascertaining the fact as to a supposed delict, the bishop should proceed with great caution, lest he unnecessarily injure an ecclesiastic and from outward appearances consider and treat him as guilty before his offence has been proved.[2] Such a rash proceeding would of itself justify a recourse to Rome which would be successful where the injurious treatment could not be justified by the subsequent conviction of the complainant. Not until the fact has been sufficiently

[1] This confirms what we said above in the note on p. 53; viz. the *Instructio* speaks of two different special inquiries, one extrajudicial, which may be compared to the sheriff's or coroner's inquest in our Common law, the other strictly judicial, which corresponds to the trial before the grand jury. If a true bill or indictment be found, then the trial before the court or petit jury begins, to which corresponds the final proceeding of our Instruction, art. 30 ff. We consider it, therefore, as another serious mistake when modern writers, e.g. *Rota*, apply equally to the preliminary summary inquest (*inquisitio pro notitia curiae*) what commentators have written *per longum et latum* on the judicial inquisition of the C. J. Can., l. v. tit. 1. Hence *Pierantonelli*, tit. 3. n. 15. unhesitatingly says: *Ex praemissis erumpit inquisitionem nostram longe differre ab inquisitione de qua agitur jure Decretalium.* See also the *Acta S. S.*, xv. 379. This preliminary inquest is also called *informatio praeparatoria* (*Van Espen*, p. III. tit. 8, c. 1, n. 37). *Stremler* very properly calls it *l'enquête paternelle* (p. 138 ff.).

[2] As regards this preliminary inquest, the bishop may direct it himself or commission a trustworthy, prudent, and impartial ecclesiastic to do it. The whole proceeding must be as quiet and secret as possible, especially with regard to witnesses. The acts with the result of the inquest must be kept in the archives, if any evidence have been found (*Acta S. S.*, xv. 380). If evidence be lacking, or if it be only slight, the acts ought to be destroyed.

ascertained and determined can the bishop decide how to proceed, whether in extrajudicial or judicial form. As a result the bishop may immediately order his fiscal procurator to institute judicial proceedings, or under certain circumstances he may direct his vicar-general to immediately lay a canonical injunction upon the accused, perhaps because he sees *periculum in mora*[1] or knows mere admonitions to be useless in the case. On the other hand, he may often be forced by circumstances to confine himself to canonical admonitions, especially when for good reasons, moral or physical, he cannot proceed judicially.[2]

88. Though the bishop may have sufficient reasons to officially admonish, correct or reprove a cleric, it will be better first to hear the delinquent himself in regard to his offence. The bishop may tell him the charge pending against him. He may also acquaint him with some of the evidence, although to communicate to him the names and depositions of the witnesses, if any have been examined, would not be advisable.[3] That the accused should be allowed to defend himself is evident. It is in the nature of such informal proceeding that the defence

[1] *Rota*, n. 643.

[2] It is evident that in the author's opinion the bishop may at once institute criminal proceedings if he has sufficient proof of the delict, and that he is not bound first to make use of the extrajudicial corrective means. In this he is supported by *Pierantonelli*, tit. 3, n. 18, 16, 20. It also seems implied in *Instr.*, arts. 3, 10, 11; nor is there anything in the Instruction to prove the contrary, although that is maintained by the *Acta S. S.*, l. c., and *Rota*, who probably were misled by art. 7. We think the sense of the Instruction is nicely stated by the Council of Baltimore, which says: *Si ulterius procedere debet*, et natura ac gravitas abusus vel delicti de quo inquirit sinit, *non statim ad processum judicialem transeat, sed modo extrajudiciali media adhibeat praeventiva* etc. (n. 309). The rule, therefore, is, that the bishop should not proceed to a trial as long as there is no necessity, or where there is a chance to remedy the evil otherwise. *Horret enim Ecclesia judiciorum arma.*

[3] C. Pl. B. III., n. 309; *Acta S. S.*, xv. 380; *Pierant.*, tit. 3 n. 16. *Droste* maintains the contrary.

may frequently come only after the admonition. In such cases the defence will mostly consist in explaining one's conduct or action; e.g. that under the particular circumstances he had to act as he did, and perhaps that even in future he cannot do otherwise.

If the accused or suspected cleric cannot fully clear himself of the charge, corrective measures are to be used. The first are canonical admonitions. Such warnings, instructions and corrections are especially appropriate when a fault or delict has not been fully proved, but where a well-founded suspicion still remains; the more as these measures cannot properly be called punishments. Instructions and admonitions in general can be given even without any previous fault, and spiritual exercises are looked upon rather as good works to be performed than as an evil to be endured. In such cases, however, the bishop must take care lest in his words and manner he presume the guilt of the party concerned.[1] It is evident that every admonition should have its own particular object, and ought to be clear and precise. In some cases it will refer to the proper fulfilment of obligations already existing or to the avoidance of improper conduct: e.g. to observe the law of canonical residence, not to remain out too long at nights, to avoid certain places, etc. It is against the nature of canonical admonitions to impose any punishments in the proper sense. Their main object is to remove voluntary occasions of delicts, and to repress sinful habits. It is equally against the spirit of ecclesiastical criminal law immediately to inflict strict punishments in these cases, without first having attempted milder remedies.[2] It is different, of course, in case of a serious fault or delict fully proved.

[1] AJP., XII. 836, 726.

[2] The admonition should not even threaten punishment. Cfr. n. 309 C. Pl. B. III.

89. It has been remarked above that the *Instr.*, art. 6, distinguishes two different canonical admonitions, one paternal (*in forma paterna et secreta*), the other legal (*in forma legalis*) or strictly canonical. The very distinction indicates that paternal charity and mildness are the characteristic features of the first. Hence the bishop will as a rule personally[1] give this admonition, according to the direction of our Divine Master: "If thy brother shall offend against thee, go and rebuke him between thee and him alone."[2] He will instruct and admonish the delinquent either in writing or by word of mouth, but as secretly as possible, in order to show by the very form and in his manner that he is acting as father, not as judge. Art. 6 allows the bishops to employ a middle person; but he should not avail himself of this right, except for reasons which make it appear necessary or advisable.[3] He should not employ for that purpose his vicar-general or Official, as the proceeding would by reason of that alone smack too much of the judge.[4] It is also strictly forbidden, both legally and morally, to enter a paternal admonition on the records of the chancery. The bishop must make a private note of it,[5] in order to justify himself in case of a recourse, but even charity forbids him to make it public.

90*. Formal or strictly canonical admonitions may be given either at once before any paternal monition, if the bishop consider it necessary,[6] or only in case where the

[1] AJP., XIX. 1120.

[2] *Matt.* XVIII. 15.

[3] The *Acta S. S.*, XV. p. 381, remark that the person thus employed should be from among those who by their piety as well as learning and practical knowledge are among the best of the clergy.

[4] *Rota*, 634.

[5] If the admonition was made by another, he must certify to it, and the bishop will keep that certificate.

[6] *Acta S. S.*, XV. 381.

accused cleric makes light of the paternal correction given to him, or even refuses to accept it. It is not difficult to see wherein these differ from that. There the bishop advises and corrects as father and in secret; here he corrects and reproves as the custodian of the law, or as civilians would say, *qua imperium habens.* Hence the form of such canonical admonition is called legal, i.e. according to law with legal formalities, and therefore no longer secret but before witnesses. There is no difficulty in these points, when the accused appears personally before the bishop or before the person commissioned by the bishop, which commission in this case must be in writing and shown to the party to be reprimanded. But when this admonition is given by letter, the document ought to be formal, i.e. signed by the chancellor or notary (not merely by the private secretary). If sent by messenger, the delivery ought to be sworn to as in case of a judicial citation; if by mail, it must be registered. The whole transaction is to be recorded in the chancery. This is the reason why it is no longer called a secret admonition, because it becomes known to the law, although it is still to be kept secret from the public.

This formal or legal admonition is also to be a mere correction or reproof; however severe or strong, it should not contain any threat of punishment properly so called in whatever shape. Canonists seem to restrict such commination to the canonical precept or injunction. The sole object of this *monitio* is to correct the accused and to warn him to beware lest worse ensue. The formalities observed in the proceeding are for the purpose of making it more impressive, and moreover of providing ready proof of his obstinacy, if he refuse to amend. By these it may afterwards be shown that the admonition was formally addressed to the delinquent; the presence of

witnesses has really no other object.[1] But in order not to injure unnecessarily the reputation of the person admonished, the witnesses may be sworn to secrecy.

Finally, we should like to call the attention of all whom it may concern to the beautiful discourse in which *Rota*, n. 637 sqq., explains the four qualities that *St. Liguori* demands for such official admonitions. They are charitableness, prudence, opportuneness, and secrecy.

Art. II. Canonical Injunctions.

91. The canonical injunction[2] is a jurisdictional and public act like the official admonition. It stands in the same relation to criminal procedure as the general penal law does, except that it is *special* criminal legislation. When the bishop is informed of the irregular conduct of some cleric or of other faults and dangerous occasions of his clerical inferior, or has found canonical admonitions to be of no avail in correcting him, or positively knows from the outset that they will be disregarded, he will give a special command to that cleric telling him what to do or to avoid or how to shape his conduct in the future, sanctioning that command by the commination of a certain and clearly determined punishment in case of disobedience (art. 7). This punishment, however, is always *ferendae sententiae;* and even where for the fault or delict to be corrected a certain punishment is already fixed by law, the same may be threatened by the injunction whenever

[1] c. 48. X., v. 38.

[2] *Webster* defines an injunction in law to be a writ or process, ordered by authority, whereby a party is required to do or to refrain from doing certain acts. It is, however, more generally used as a preventive than as a restorative process, although not confined to the former. This exactly covers the *praeceptum canonicum*. The *Instr.* calls it *pr. analogum*, which only means that the injunction refers to the same object or acts as the previous admonitions. Cfr. on the present subject *Rota*, n. 642 sqq.; *Pierantonelli*, tit. 3, n. 20.

it will not *ipso facto* be incurred, but must be inflicted by the Ordinary. Such special commands will mostly be necessary in cases or conditions that cannot be regulated by general laws in such a way that one could not successfully circumvent those same laws. Hence the necessity of these special canonical injunctions whether mandatory or prohibitory for special cases according to particular circumstances.

If the law forbids a superior to give canonical admonitions without good reasons for doing so, it is evident that greater reasons are required to issue a canonical injunction,[1] and this the more when there is question of other persons on whose account the injunction is laid on the cleric. In such cases the greatest precaution is required,[2] even when the summary inquest that must precede the action[3] has revealed good and sufficient grounds. Such would be the case, e.g., if a cleric were forbidden for cause from visiting, except in case of necessity, certain persons, houses or places (the so-called *praeceptum de non frequentando*). If in such a case an injunction has been unnecessarily and unjustly issued, the S. Congregation will upon appeal deal severely with the appellee.[4]

92. How the bishop shall proceed in issuing a canonical injunction, the *Instr.* explains in art. 8. He will first cite (*praevenire*) the delinquent by an official summons to appear at a stated term to hear the injunction. This does not prevent the accused from defending himself meanwhile, but rather offers him an opportunity to do so, if there be any chance, and thus avoid further proceeding. But if he cannot make any good defence, and ap-

[1] *Rota*, l. c.

[2] The warning given in the *Instr.* 1878 at the end of art. 5 applies here as well. See Appendix.

[3] S. C. Epp., 14 Jan. 1817. AJP., XX. 452, v.

[4] S. C. Epp., 1731. AJP., XIX. 1120, IX.

pear at the appointed time, the injunction will be read to him by the chancellor in presence of the vicar-general or of two ecclesiastics or two laymen of known integrity. The record or minute of the transaction is to be signed by the parties present, also by delinquent although he is not bound to do so.[1] This record is to be filed in the chancery. The reason of these formalities is evidently the same as in case of formal admonitions.

The canonical injunction is to be drawn up in writing. It must contain the name of the person issuing it (the bishop), the name of the guilty party, the precept, i.e. what delinquent must do or omit, and finally the sanction, i.e. the punishment, which will be inflicted upon him if he does not comply with the precept. The sanction, as a rule, will be excommunication, suspension, or recall of faculties, but may also be a pecuniary or other canonical punishment.[2] Punishments *in subsidium* may at the same time be threatened, for instance, censures in case a pecuniary penalty inflicted should not be paid.[3]

Injunctions of this kind, evidently, are not all honorable, especially as the presumption is that delinquent has previously received canonical admonitions in vain. Yet, as it is not intended to dishonor or degrade him before others, but to correct and reform him, the process should be served on him as secretly and privately as possible within the form prescribed.[4] If the accused does not ap-

[1] Whether delinquent has a right to demand a copy of the injunction, or whether it would be advisable to give him such a copy, even if not demanded, we dare not decide As the whole proceeding is extrajudicial, we are inclined to answer thus: To the first, *distinguo:* a simple copy or mere memorandum, granted; an authenticated copy, denied. The same answer to the second query.

[2] AJP., XIX. 1118, V.

[3] S. C. Epp., Dec. 1734. AJP., XIX. 1122. XII.

[4] For the same reason the precept itself ought to be of such a nature that by obeying it the person may not give cause for public suspicions and rumors. *Pierant.*, tit. 3, n. 20; *Rota*, n. 645.

pear at the appointed term, the reason for his non-appearance must in the first place be ascertained.[1] If it appear to be a case of contumacy the injunction may be sent to him in writing. In this case we should indeed try to obtain from him a note certifying that he had received the document; however, he will most likely refuse to accept the letter, and, of course, give no receipt therefor. In that case the paper may be left at his residence, or, if he have no residence, may be posted on the church door or in some public place.[2]

Like every other law, the canonical injunction has a definite time when and for which it begins to operate. A certain time is given to the delinquent within which he must comply with the precept, otherwise the special punishment will be pronounced and executed, and judicial proceedings begun.[3] Canon law requires that the canonical monition shall be repeated three times before the punishment therein fixed be actually inflicted. But if there are reasons which make it proper to give it but once, the *monitio* itself must expressly state that it is the first and last. Canonists require a term of at least two days for each of the three admonitions, so that in the case of a single peremptory monition six days will have to elapse before the threatened punishment can be inflicted.[4]

[1] Why not send a second, but peremptory summons?

[2] What an antiquated notion, especially for us Americans! Why will sensible men still cling to those old methods of canonical procedure, civil or criminal, that are out of all harmony with present times and minds? If with us neither messenger nor registered letter can reach the person wanted in proper time, we should conclude at once that there is a *casus notorius* of something wrong, and further action clear.

[3] C. Pl. B III., n. 309.

[4] We remarked in n. 86 that to our mind the canonical admonitions of our Instruction are not of the same nature as the *trina monitio* here spoken of. The same we hold in regard to the canonical injunction, which seems to us to be peremptory by its very nature, at least when following previous admonitions.

Art. III. The Tridentine Suspension.

93. The *remedium ex informata conscientia*, as it is called in our Instruction, art. 9, or the *sententia ex inf. consc.*,[1] as usually termed by canonists, is that extrajudicial proceeding by which the Ordinary may on account of some secret offence, of whose existence he is personally convinced, exclude a cleric from the sacred orders generally, or forbid him from ascending to a higher one, or suspend an ordained cleric.

Previous to the Council of Trent the bishop could not refuse to confer Holy Orders on any person who was not convicted of a criminal offence by a legal canonical trial, or at least against whom such a proceeding had not been already begun; the same was true of the promotion to a higher order, and of suspension from the exercise of such orders. Pope Lucius III., a. 1183, allowed regular prelates to refuse the higher orders to their subjects even without previous judicial conviction, when they were satisfied in conscience that a secret offence had been committed.[2] This papal ordinance was by the Council of

[1] To avoid in English the continual repetition of that unwieldy phrase *ex informata conscientia*, we presume, at the risk of being charged with forwardness, to suggest the term *Tridentine* or, what will do as well, *extrajudicial* suspension. When in matter of marriage a writer mentions the Tridentine decree, every student of Canon law knows exactly that it is none other than the one quoted as *Tametsi*, S. XXIV. c. 1, *de Ref. matr.*, because by it a new form of contracting marriage had been created. Such a new special creation was made in Canon law by the Council of Trent in the matter of ecclesiastical suspensions, by granting to the prelates of the secular clergy the power to proceed in certain cases extrajudicially, or, as the phrase is, *ex informata conscientia*. Hence if an author, speaking of suspension or in general of canonical criminal proceedings, should mention *the Tridentine suspension*, we think he would be readily understood to refer to S. XIV. c. 1, *de Ref.*, quoted below in the text.

[2] *Esse potest quod praelati eorum commissa secreta noverint ex quibus constat eis quod salva conscientia nequeant sublimari.* c. 5, X., I. 11.

Trent, S. XIV. c. 1, *de Ref.*, extended to the whole secular clergy. These are the words of the Council: *Quum honestius ac tutius sit subjecto debitam praepositis obedientiam impendendo in inferiori ministerio deservire, quam cum praepositorum scandalo graduum altiorum appetere dignitatem, ei, cui ascensus ad sacros ordines a suo praelato ex quacunque causa, etiam ob occultum crimen quomodolibet, etiam extrajudicialiter, fuerit interdictus, aut qui a suis ordinibus seu gradibus vel dignitatibus ecclesiasticis fuerit suspensus, nulla contra ipsius praelati voluntatem concessa licentia de se promoveri faciendo, aut ad priores ordines, gradus, dignitates sive honores restitutio suffragetur.*

94. From the time of the Council down to our own, canonists have disputed[1] much about the precise extent and object of the power thus conferred on bishops and Ordinaries in general.[2] The following positions, however, are certain. This Tridentine suspension may not only prevent one from ascending to sacred orders, but also from exercising those already received, like any other suspension.[3] The bishop may proceed by extrajudicial suspension only in case of a grievous offence

[1] Most of those disputed questions are now cleared up by the concise and ample instruction on this subject addressed by the *S. C. Prop. Fide*, 20 Oct. 1884, to the secular and regular prelates in missionary countries. See *Appendix*. In the following notes we refer to it by *Instr.* 1884. We omit from the author's text a number of passages that we deem unnecessary. Those desiring a fuller treatment of the subject by modern authors are referred especially to *Pierantonelli*, tit. vii.; *Rota*. p. II. sect. 3, n. 509 sqq.; *Bouix*, II. p. 310 sqq.; *Stremler*, p. 309 ff.; *Smith*, n. 1279 ff. Cfr also the famous *Causa Lucionensis* given in full by the *Acta S. S.*, XIV. p. 299, sqq. For a short and clear *résumé* of the present teaching of canonists on the Tridentine suspension consult *Santi*, l. v. tit 1, n. 11 sqq. For the *rationale* of this Tridentine law consult *Cavagnis*, vol. ii. p. 153, and especially *Pallotini's* work.

[2] S. C. C., 14 Nov. 1654. AJP., XIV. 974. Whether this include also vicars-general is disputed.

[3] *Instr.* 1884, art. 1.

deserving severe chastisement.[1] If there were only a lighter offence (*causa levis*), Rome in case of recourse will assuredly annul the sentence.[2] The most important condition, however, is that the crime be a secret or occult one.[3] The bishop cannot punish a public offence by an extrajudicial suspension.[4] It would be null and void. The particle *etiam in occultis*, in the Tridentine decree quoted above, has not an extensive but a restrictive meaning, something like *scilicet*, namely;[5] yet that this suspension may be inflicted on some one for an occult crime, although he be at the same time guilty of public delicts, was declared by the S.C.C. on the 27th Feb. 1875.[6]

95. Here the important question arises, when is an offence *occult* in the sense contemplated by that Tridentine decree? Canonists mostly agree on this answer: 1. When it is such in the ordinary and common acceptation of the term;[7] 2. When although not being in itself simply secret or occult, yet for certain reasons it cannot be established by regular trial.[8] Such reasons may be, e.g., the refusal of witnesses to testify, or State interference, or other

[1] *Ibid.* art. 6.

[2] S. C. C. 1728. AJP., XIX. 1119.

[3] *Instr.* 1884, art. 6; *Rota*, n. 522 sqq.; *Lucidi*, I. c. 3, n. 272 ff.

[4] S. C. C., 20 Dec. 1873; *Acta S. S.*, VII. 575.

[5] AJP., XIX. 1228.

[6] *Acta S.S.*, VIII. 553. This is confirmed by *Instr.* 1884, art. 8.

[7] The *Instr.* 1884, art. 7, calls a delict occult when it is not yet an object either of a judicial trial or of public rumor, and when it is known to such few and discreet persons that it cannot be called public. Cfr. the *Causa Ugentina*, 9 Aug. 1884, ap. *Acta S. S.*, XVII. 368 sqq.

[8] This, as *Pierant.*, l.c. n. 21, rightly says, includes our summary trial. By this new form of trial delicts can be much more easily proved than by the former plenary and ordinary judicial proceeding Hence there will undoubtedly be rather few cases where a canonical offence, although not simply occult, could not be proved by a summary trial. This may explain why the *Instr.* 1884 does not mention that second signification of *occult*, although it is otherwise admitted by all to be within the meaning of the Tridentine ordinance,

impossibility of obtaining judicial evidence; and again when a trial, on account of great scandal, would do more harm than good among the faithful.[1] This condition, therefore, implies either that there is actually evidence enough to convict the guilty person, but it cannot be got in the regular judicial way, and hence no judicial conviction can be arrived at; or that higher considerations forbid regular proceedings which are in their very nature public. But how may the bishop be certain, how can he prove, that a regular trial is impossible although he has sufficient evidence of the crime? There is no difficulty in case of physical impossibility; as to the moral impossibility, because of the evil arising out of a public or formal trial, the bishop must carefully consider the whole case to satisfy his own conscience, and see if he be able to justify his action if called upon by Rome. As a rule, when delinquent does nothing whatever to create scandal, or when presumably he will do nothing of the kind, if regularly tried; or especially if he have privately requested of the bishop such a trial, the bishop ought to begin the trial and see how far he may succeed. When bishops proceeded extrajudicially in such cases, Rome had often to remedy it.[2] It must also be observed that where on account of extraordinary circumstances even a notorious delict cannot be judicially established, still the Tridentine suspension may not be inflicted. The bishop will have to institute the so-called trial *de notorio*.

May an offence still be considered occult in the sense pointed out, when judicial proceeding has already been instituted against delinquent? We must distinguish: while the process is going on, and after a conviction has been obtained, the offence must be considered public. Not so, however, when the result is acquittal. Taking for

[1] AJP., XIX. 1229. [2] S. C. C., Mch. 1858. AJP., XX. 166.

granted that the person acquitted is really guilty, and that he was acquitted only because judicial proof could not be obtained, we must admit that by the acquittal the offence has again become secret, the publicity of the offence has been removed, as the judge has publicly declared the accused not guilty of the offence laid to his charge. In this case the bishop may still proceed extrajudicially against delinquent if he has positive proof of his guilt.[1] The Tridentine suspension cannot be imposed for a crime after a judicial conviction of the same, but the punishment publicly decreed by the sentence is to be inflicted.

Roman declarations, the teaching of canonists, and the very nature of the Tridentine suspension leave no doubt that the bishop must be fully convinced of the guilt of the person against whom he intends to proceed, before he may use this remedy. He must not act upon impulse and feeling or a mere suspicion however strong, but the evidence of the guilt should be such as may also convince other thinking and sensible men and especially, in case of a recourse, the eminent members of the S. Congregation.[2] A mere assertion by the bishop is not enough. If complainant brings some evidence to the contrary, the Congregation orders the suspension to be removed, at least with the clause *cum reicidentia*,[3] or, if the reason clearly appear unjust, declares it void.[4]

96. The effect of the Tridentine suspension, as said before, is to prevent a person from receiving a sacred order, or, if he be ordained already, from exercising it. The suspension may therefore be *ab ordine et officio.*

[1] Cfr. *Pierantonelli*, tit. c., n. 13.

[2] For, in this case the S. C. will require equally strong reasons to uphold the extrajudicial suspension that it would in case of appeal from a strictly judicial suspension. *Acta S. S.*, v 22. Cfr. *Instr.* 1884, art 10.

[3] S. C. C., Dec. 1721. AJP., XIX. 1117, II.

[4] *Acta S. S.*, l.c.

But the Council did not in this decree explicitly grant the power to suspend *a beneficio*, nor is an extensive and liberal interpretation admissible, as it concerns a penal law.[1] The suspension does, however, to a certain extent affect the *beneficium* of the suspended cleric, as he must pay from his income the honorary of a substitute, if necessary.[2]

How long may this suspension last? We think the bishop might *ex informata conscientia* exclude a candidate forever from receiving higher orders, especially as the latter may himself come to the conclusion that he has no vocation.[3] The bishop, however, should not thus suspend *in perpetuum* from order or office;[4] nor, as a rule, for an unlimited, indefinite time, to be revoked at pleasure.[5] If the bishop has nevertheless for grievous cause suspended *ad beneplacitum*, the suspension is temporary and will lapse of itself with his death, or, what in regard to his diocesan jurisdiction amounts to the same, with his translation to another see, etc.[6] Canonists contend that the Tridentine suspension should not continue longer than six months.[7] If it be longer than a year, the S. Congregation will, upon petition of the suspended cleric, readily remove it.[8]

With regard to a recourse to Rome against the Tridentine suspension suffice it here to say that it has *per se*

[1] *Rota*, n. 520,

[2] Thus the *Instr.* 1884, art. 4. It would appear from this that *Santi's* opinion, l. c., n. 22, is untenable.

[3] That is not the question. A clerical candidate may certainly be put off *in indefinitum* from receiving higher orders for *any good cause whatever*. But the author seems to forget here that the Tridentine suspension or in the present case prohibition, is a chastisement for crime only. For this reason we think that in regard to the duration of the Tridentine suspension it makes no difference whether we refer to its first or second effect.

[4] *Instr.* 1884, art. 5.

[5] *Rota*, n. 519; *Lucidi*, l. c., n. 264 ff.

[6] *Instr.* 1884, l. c.

[7] AJP., XIV. 975.

[8] S. C. C., Dec. 1733. AJP., XIX. 1121.

neither suspensive nor devolutive effect, and the suspension remains in force till removed by the S. Congregation. Such recourse in case of a prohibition from receiving sacred orders has seldom been successful.[1] Candidates thus put off have sometimes petitioned Rome to command the bishop to proceed against them judicially in order to show cause why they should not be ordained. The S. Congregation, however, will not grant such requests, and rightly so. One may be a good and honest person without being called to the priesthood or sacred orders. Hence the S. C. has generally advised such petitioners so to conduct themselves that if they really have a clerical vocation, the bishop may of himself come to such a conviction ; that, moreover, they should address renewed petitions to the bishop himself.[2]

97. The Tridentine suspension being an extrajudicial act, the bishop is not bound to observe any judicial formalities or to premise canonical admonitions.[3] Still, as the bishop should in every judicial procedure be guided by the consideration *se pastores, non percussores esse* (C. Trid.) and never forget the precepts of Christian charity towards their erring brother, so likewise, and for greater reasons, in the present case. The delict to be punished is an occult, a secret one. The bishop is therefore not permitted to make known to others the fault any more than the punishment. As long as the delict remains unknown, the good name of the delinquent is preserved ; he possesses still the respect of the community, and enjoys that external honor which is such a great good particularly for an ecclesiastic who has care of souls, and who without a stainless reputation cannot do efficient work. It might seem, though, that by the suspension itself this external honor of the ecclesiastic were already in some degree

[1] AJP., XI. 1105. [2] S. C. C., 7 Sept. 1759. AJP , XX. 69.
[3] *Instr.* 1884, art. 2.

jeopardized; yet the effects of this suspension are such as an ecclesiastic may under circumstances voluntarily impose upon himself. He may for reasons of piety, conscience or scrupulosity retire for a while into solitude to collect himself and provide more surely for the salvation of his soul; or he may for temporal causes, which are not always given out in public, refrain from some public functions, or go abroad, etc. Again, a person about to receive orders may from motives of conscience and of his own accord put off being ordained or retire altogether. Hence the consequences of a Tridentine suspension need not necessarily appear to the public as a punishment.

On account of the very strict secrecy and caution to which he is bound, the bishop will generally have to act personally throughout the whole case. How he receives the first intimation that an offence subject to this punishment has been committed, is a question of fact. But to obtain a full conviction and certainty thereof, he has often to gather all kinds of proof or evidence. Nothing prevents him from examining the delinquent himself. Often he must examine witnesses. Here he must proceed with the greatest caution. It will be advisable to make witnesses promise under oath not to reveal either their depositions or the fact of their examination. A clerk or secretary should not be present.

When the bishop is convinced of the offence charged, and if after a careful consideration of all the circumstances of the case he is of the firm opinion that the offence is a secret one in the sense above explained, he may then pronounce the sentence *ex informata conscientia*, which may possibly, coming without any previous admonition or warning,[1] strike the offender like *fulgur de coelo sereno*.

[1] Although the bishop is not bound by law to premise a canonical admonition, yet prudence as well as charity seem to demand it, *quoties fieri*

The sentence of the suspension (prohibition) must be in writing; an oral communication alone will not suffice.[1] The bishop must personally deliver it to the delinquent; nor may he employ the post-office to deliver the writing, although the messenger may not have the least suspicion of the contents. For, this mode affords no absolute certainty of secrecy. Nothing, therefore, is left to the bishop but to cite the person to appear personally, and then intimate the sentence and deliver the writing.[2] It is strictly forbidden to enter it in any manner on the records of the episcopal chancery.[3] The bishop must make a private note thereof, to serve as evidence before the S. Congregatio Concilii, should the delinquent appeal by recourse. If any such notes be found after the bishop's death, they are to be inclosed in an envelope addressed to the bishop's successor, and kept in the chancery. The successor, having ascertained their nature, must destroy the notes; but in no case is he allowed to make use of them.[4] The vicar-general is expressly forbidden to take possession of these notes, as may even be inferred from the fact that with the bishop's death he ceases to be vicar-general. The bishop might do well to use fictitious names in these notes, especially as the suspension terminates upon his death.

possit nec sit periculum in mora. Pieranton., h. t., n. 4. Nothing more than this is proved by the verbose rather than weighty discussion of *Rota*, 529 sqq., against *Bouix*. The *Instr.* 1884, art. 9, only directs the bishop to join paternal admonitions *with* the suspension, so that it may not remain a mere repressive remedy, but become at the same time a means of correction and amendment.

[1] S. C. C., 5 Sept. 1883. AJP., xx 84.

[2] The author asserts that the bishop may not employ another person to communicate the sentence to the delinquent. This opinion can no longer be maintained as the *Instr.* 1884, art. 3, explicitly states the contrary.

[3] S. C. C., 11 Aug. 1758. AJP., xx. 68.

[4] AJP., xix. 1129.

The written sentence to be communicated to delinquent must contain the name of the person suspended; it must clearly state the nature, extent and duration of the suspension, and that it has been decreed against him in accordance with c. 1, S. XIV., C. Trid.[1] Finally, it must bear the subscription and signature of the bishop. The document need not give the reasons for the suspension,[2] much less need the bishop make known the evidence and testimony of the witnesses.

CHAPTER II.

THE JUDICIAL TRIAL.

Art. I. The Auditor's Inquest.

99. By judicial trial we mean here those criminal proceedings where after judicial conviction proper ecclesiastical punishments, especially greater and severer ones, will be inflicted. We certainly do not mean to gainsay the right of the bishop to enforce the observance of diocesan statutes or other ordinances by lighter punishments, especially pecuniary penalties, to be executed in purely administrative ways. Even in regard to the administration of church property he may find it necessary to use similar coercive means to keep or restore order in these affairs. Yet such administrative penal policy will be of no consequence unless the delinquent voluntarily submit himself. If he do not, the bishop must after all have recourse to the judicial criminal procedure.

The remote condition necessary before criminal proceedings can be instituted, is the violation of some penal law whether general or particular, or of a canonical in-

[1] *Instr.* 1884, art. 3, 45. [2] *Ibid.* art. 9.

junction. The common principle *Nulla poena sine lege* is also embodied in the *Instr.*, art 10. The next condition is that the authorities be informed not only of the offence or crime committed, but also of its author. Without any knowledge as to the probable offender, no regular trial can be instituted. The criminal proceedings will begin upon motion of the fiscal procurator.[1] By what means he obtains the required previous information is always a mere question of fact. He may obtain it directly or indirectly through the bishop or other ecclesiastical officials, by way either of a petition or a complaint, by public or private notices, by rumor, or even in the course of some other judicial or extrajudicial investigation. All this is implied in art. 11 of the *Instr.* We are here no further concerned with these questions of mere fact. But we wish to remark that anonymous communications are to be received with the very greatest caution.[2]

The honor of the Church and of the clerical state, the good character of the priesthood so indispensable to any beneficial labor for the salvation of souls, the full confidence in the priest so necessary to those confided to his charge, are high considerations why the fiscal procurator must in every official act be exceedingly discreet, careful and circumspect. How often does it happen, thus wrote the S. Congregation to the Bishop of Elba, that an ecclesiastic "est poursuivi par un parti hostile qui l'accuse pour des fins particulières."[3]

100. When the fiscal procurator has a well-founded suspicion or is otherwise sufficiently informed that a crime has been committed, he must first inquire extrajudicially[4] into the actual fact, and thereby ascertain not

[1] *Pierantonelli*, tit. 5, n. 2. 3; *Rota*, 648 sqq.; *Acta S. S.*, xv. 384 sq.
[2] *Pierantonelli*, tit. 3. n. 11. See also *supra*, n. 36.
[3] 19 Apr. 1858. AJP., xx. 166.
[4] AJP., xiv. 971.

only those circumstances which tend to criminate the accused, but also those that tend to exculpate him.[1] For this purpose he may interrogate witnesses and experts, and ask the ecclesiastical authorities for help and assistance. This extrajudicial and preliminary inquest, which, in order to avoid scandal, must be made in a discreet and forbearing manner, is absolutely necessary, except in case of notoriety, before a judicial criminal proceeding can be instituted.[2] This is expressly required by the *Instr.*, art. 15.[3] A hasty, inconsiderate beginning of criminal proceedings, without a sound and legal basis, justifies a complaint to the higher authorities.[4] The result of this preliminary investigation will be either to begin a public action or to proceed extrajudicially or to leave things *in statu quo*, according as the bishop has succeeded in collecting sufficient evidence to warrant further proceedings or not. In matters of correction proper in which *poenae medicinales* are employed, judicial action is barred by limitation in five years.[5] The fiscal procurator must moreover refrain from bringing suit when the bishop forbids it, upon whose commands of course he entirely depends. What may induce the bishop to discard all criminal proceeding is in most cases a question of fact.[6] A peculiar case is mentioned by the *Instr.*, art. 43.[7]

101*. If sufficient ground has been discovered upon which to institute a criminal trial, the bishop will order his public prosecutor to formulate and bring in the

[1] See our remarks on the subject *supra*, n. 35.

[2] S. C. Epp., 23 July 1831. AJP., xx. 460.

[3] Cfr. *Acta S. S.*, xv. p. 387. On this previous inquest see our remarks *supra*, n. 87.

[4] S. C. Epp., 23 July 1831. AJP., xx. 460.

[5] S. C. Epp., 7 May 1830. AJP., xx. 718. 20 June 1831. AJP., xii 1132.

[6] See *supra*, n. 34; *Stremler*, p. 154.

[7] Cfr. *Acta S. S.*, xv. p. 397; *Rota*, n. 857.

charge.[1] It should be a clear and definite statement of the case, giving the name of the delinquent, the nature and extent of the offence or delict, and the laws that were thus violated. It might also contain a summing up of the evidence gathered in the previous inquest. A copy of such a specified and at the same time comprehensive charge ought to be given to the auditor, to whom it would be a most serviceable guide during the following judicial inquiry.[2] Having received the charge, the bishop will appoint or commission an auditor[3] to conduct the informative proceeding, by which all the evidence bearing on the case for the prosecution as well as the defence is to be gathered.[4] The *Instr.* clearly indicates two phases of this inquest which have been called respectively *offensive* and *defensive proceedings*. The first (arts. 17–21) consists mainly in gathering, especially by witnesses, all the evidence that may prove or establish the charge against the accused (*ad culpam accusati probandam*), although, as we remarked elsewhere (n. 28), the auditor must be careful not to conduct the inquest on the supposition that the accused is really guilty. Even now he must try to find evidence, if there be any, that may exculpate the delinquent. After the auditor has, under the prosecutor's guidance, obtained all the evidence available for the prosecution, he will begin the defensive proceeding (arts. 21–28), which opens with the citation of the accused.[5] The legal requisites of the citation, examination, and eventual confession of the accused are explained above.[6] The accused may be examined at his own residence if

[1] C. Pl. B. III., n. 311.

[2] This is quite in keeping with the *Instr.* 1878, arts. 1, 2, 6.

[3] See Article II., p. 52.

[4] On judicial evidence see Chapter II., p. 92.

[5] *Droste* holds that the defensive proceeding begins only with the final pleading.

[6] Article II., p. 96.

circumstances allow it. In this case the citation must contain the command to remain at home at an appointed time, when the auditor and clerk will call upon him. The accused must be examined in person ; he cannot be represented by attorney. The examination will be conducted by the auditor exclusively, although the fiscal procurator may be present.[1] Defendant is, however, as yet denied counsel or advocate.[2] The accused may answer the questions put to him or may refuse to do it, which, however, will always create suspicion ; he will not be forced to answer. Yet courtesy would require him at least to answer the general interrogatories. He is allowed to make any relevant allegations and averments for his defence and to offer any verifications he can possibly give, etc. Whatever evidence for the defence the auditor may thus be able to obtain must be taken, as the *Instr.*, art. 25, demands. Against the evidence for the prosecution defendant may try to prove it to be conflicting, variant, rather slight and inconclusive. In the later proceeding, after the publication of the testimony, the defence may challenge the opposing witnesses, their credibility and competency ; or if a denial of the charge is impossible, it may put in a plea *in avoidance* (showing that the action charged is not criminal nor subject to disciplinary correction), or a plea *of justification* (proving that defendant had a right to act as charged), or a plea *in excuse* (showing circumstances to extenuate and diminish the grievousness of the charge).[3] All the allegations, exceptions and pleas of the accused are entered on the minutes by the clerk, whom the auditor ought to direct and help in the matter. The minutes are read to the accused or handed to him for inspection. He is then asked whether he wishes anything to be changed or added, and any such request of his must as far as possible be complied with. Finally,

[1] AJP., XIV. 927. [2] AJP., XX. 734. [3] *Rota*, n. 728.

the accused, if willing, should sign the minutes; so also must the auditor and the clerk. If defendant demand it, a probatory term must be given, when he may hand in his defence in writing.[1]

102. While the auditor was engaged in taking evidence for the prosecution and the defence, the fiscal procurator may have found additional evidence on his side. If so, he may offer it after the hearing of defendant, and the auditor may thus have to examine new witnesses, or the former on new but relevant matter, or to institute other judicial proceedings. The results of this new inquiry must be communicated to defendant the same as before, who thereupon has the right to answer and defend himself anew, because he or his defender is always entitled to close the case. Several probatory terms may thus become necessary before all the evidence for and against the accused is collected and the inquest may be closed.

When neither party has any more evidence or motions to offer, and the auditor himself considers the investigation complete, he will declare the inquest closed,[2] and make out a written *résumé* of the results of the investigation, according to art. 29.[3] This abstract together with the whole *procès-verbal* (the acts) of the inquest the audi-

[1] *Instr.*, art. 28.

[2] "Conclusio in causa est actus judicialis quo utrique parti ulterior probationum seu exceptionum productio interdicitur." (*Sanguineti*, n. 618)

[3] The abstract is to give the main arguments (*summarium praecipuorum argumentorum—ristretto delle essenziali risultanze*) *pro* and *contra* as derived from the evidence obtained at the inquest. We would advise the auditor for the sake of ready reference to mark the folios or sheets containing the acts or minutes not only by the ordinary numbers for the paging, but also with letters of different type or in different ink (A, b, γ, 4), according to the different kinds and parts of the evidence. By such a device he can easily indicate where the evidence from which he draws the conclusions is found in the acts or minutes. This résumé or abstract by the auditor may be compared to the judge's "charge" (summing up) to the jury in Common law.

tor transmits to the fiscal procurator, notifying him at the same time that he has finished his work and closed the inquest.[1] The fiscal will peruse the documents in order to draw up his last charge and motions (*requisitoria fiscalis*) for the final pleading, supported by the evidence obtained in the trial. When he has finished he will deliver the documents (the auditor's abstract and the acts) together with any special motions of his, which, however, he cannot afterwards change, to the bishop or the judge appointed, who, after examining them, will fix a term for the final pleading, to which he must accordingly summon defendant as well as the prosecutor. *Instr.*, art. 35.

The time intervening between the close of the inquest and the final proceeding must, however, be sufficient to allow the accused and his counsel to prepare themselves for the defence; a period of only two days would cause the proceeding to be annulled.[2]

[1] There is some difference between the *L'Ordinario* and the *Cum Magnopere* with regard to the final proceeding. It mainly consists, as we remarked *supra*, p. 142, note 4, in the fact that the American Instruction positively shuts out any parol pleading, so that the accusation as well as the defence must be made and handed to the judge in writing. By analogy, though, with the *Instr.* 1878 for the Committee of Investigation, arts. 6, 7, which the *Cum Magnopere* follows in many points, we believe that the court when sitting to give sentence might first allow the fiscal procurator and the counsel for the accused to read respectively the charge and the defence and offer oral explanations. The regular pleading, however, being in writing, the *Cum Magnop.* orders, in art. 33, that the prosecutor's final charge (*conclusiones*) shall be communicated to defendant's advocate, thus to enable him to make the defence as full and thorough as he possibly can. The written defence together with the charge is then returned to the bishop (or the vicar-general, if he was appointed to try the case), who in private and at leisure will carefully study and closely examine both until he is able to conscientiously form a judgment and give sentence *juxta allegata et probata*. He will then fix a day to pronounce sentence in court, and summon the parties. On the day appointed, when all are present in court, sentence will be given without any new pleadings or transactions (art. 34).

[2] 20 Aug. 1681. AJP., XIII. 51.

Defendant and his counsel may either peruse the abstract, the procès-verbal and the fiscal's observations (art. 32) in the original at the episcopal chancery; or they may demand, at their own expense, a copy thereof certified by the chancellor. Counsel may first have to take the oath of secrecy, if the bishop so decide. But it would not be enough to give them a mere extract from the acts.[1] Such an inspection of the acts, however, cannot be allowed to defendant or his counsel before the inquest is closed, as it is virtually the so-called publication of the process. But in no case may the accused or counsel take the original acts home with them, or away from the chancery. Even when the documents may be perused at the chancellor's office, such measures and precautions ought to be taken by him that the acts cannot be abstracted or otherwise tampered with.[2]

Counsel *may* hand in the defence either in writing or print, even before the day set for the final pleading (art. 32).[3]

Art. II. The Final Pleading and Sentence.

103. The final pleading of the prosecutor and counsel for defendant must take place in presence of the vicar-general and the chancellor (*L'Ordinario*, art. 35). There is, however, nothing in the way to prevent several judges from sitting for the final hearing in a criminal case; rather it is to be recommended in order to make more certain that justice will be done.[4] The citation of the accused to this final proceeding (which is just as little

[1] 15 Mch. 1817. AJP., XIII. 51.

[2] *Cum Magnop.*, art. 32, "debitis sub cautelis." Cfr. AJP., XX. 451.

[3] According to the *Cum Magnop.* counsel *must* do it before the pleading. But as that is all in writing, we suppose the judge will fix a day when the defence must be handed in at the latest.

[4] See our remarks *supra*, p. 52, note 1.

public in the sense that the public at large may be admitted as the inquest itself [1]) is indispensable; its omission would make the proceeding void. The accused, however, need not appear in person, but may henceforth be represented by his counsel. The final proceeding is opened by the judge or the presiding officer at the time appointed. The pleading begins with the charge of the fiscal procurator, who repeats, explains and substantiates the same identical motions and allegations made by him in writing after he had read the acts and the auditor's abstract; he cannot make a new charge or motion or bring in new matter, because the defence is not prepared for it. If he nevertheless insists on doing so, the court will determine whether to allow it, which it may do only under the express condition that if the new matter be in any way material to the defence, it will either be disallowed by the court or another term will be given to the defence to prepare an answer.

Then follows the defensive pleading. It matters not whether the accused plead first or his counsel; as each has the privilege of parol pleading,[2] though they may have previously handed in the written defence. The fiscal procurator may possibly reply to the argument of the defence; in which case the accused or his counsel has the right to rejoin. In fact the proceedings as a rule cannot be closed before defendant or counsel declare that they have nothing more to say; in other words, the defence has the right to close.

104. When the parties have closed their pleadings, the judge must consider whether the cause is ready for judg-

[1] AJP., xx. 467.

[2] This we doubt. To us the *Instr.* which in arts. 34. 35 makes no mention at all of defendant, but only of his advocate or counsel, seems thereby to imply that counsel alone should do the final pleading in behalf of the defence. Nor do those articles necessarily imply *parol* pleading.

ment or not. If it is not, because the investigation was defective, and some points remain yet to be cleared up by new testimony of witnesses or experts, he must prolong the definitory term and order an additional inquest to be made by the auditor. In the other case he must render judgment at once. According to the *Instructio*, art. 35, sentence is pronounced by the judge immediately after the final pleading at the same term, and put in writing by the chancellor. If the court consist of a college of judges, they must first withdraw to deliberate on the verdict, which is given by the majority of votes. The court may also reserve judgment until a later term, but not too long. Judgment must in every case be rendered by the same judge who sat for the final hearing; if rendered by any other, it is void. The parties must again be summoned for the day when judgment will be given. They may be cited orally while still present at the final pleading.

Sentence is to be given in presence of the same parties that were present at the final hearing, i.e. the judge, chancellor, prosecutor, and counsel of defendant.[1] Defendant himself must be summoned, but need not appear. The legal requisites of the sentence were explained in n. 83. A certified copy of the sentence is given to the accused or his counsel, who should acknowledge the receipt of it so that the fact may be recorded in the chancery.[2] If the defendant live in another diocese at the time, the copy of the sentence will be sent to him through the authorities of that diocese. In case of an appeal by the fiscal procurator, a copy will be given to him also;[3]

[1] *Acta S. S.*, XV. 395: "Nequit minori personarum numero causarum criminalium judicium edi." While the *L'Ordinario* mentions only the vicar-general, the *Cum Magnop.* mentions also the bishop (art. 34).

[2] *Acta S. S.*, XV. 396, 550, note 1.

[3] 15 Dec 1857. AJP., XX. 53.

but the original written sentence must always remain in the chancery.[1] In case of a full acquittal, the acts of investigation must all be destroyed, that is to say burned.[2]

CHAPTER III.

THE APPEAL.

105*. An appeal, in the wider sense, is the calling upon a higher authority for redress against an injury or grievance sustained through the act of a lower authority. Such recourse was mostly taken from judicial decisions, and in order to be accepted by the superior court had to be made under certain conditions or legal formalities. Hence the term "appeal" in the language of the law came to be used in a technical sense of the removal of a cause under certain formalities from the lower to a higher jurisdiction[3] in order to obtain redress. This definition while it excludes any other means of redress, whether it be a simple recourse or a plea of nullity, covers all appeals judicial and extrajudicial. By the first is meant an appeal from a judicial act or anything done by the judge in his official capacity and in connection with a judicial proceeding, whether it be a final or incidental action.

[1] 12 June 1858. AJP., XX. 168.

[2] 4 Apr. 1775. AJP., XIII. 53; XX. 74.

[3] The lower jurisdiction is generally called in Latin *judex a quo*, and the higher *judex ad quem*. The latter is called in English the *appellate* court or judge. For the first we choose the term *judge-appellee*. Appellee (in Latin *appellatus*) means the party against whom an appeal is taken, which in a criminal trial is the state or attorney-general (in our case the bishop or the fiscal procurator). In an extrajudicial canonical appeal it is mostly the bishop (*judex*), again, who is appealed against. Hence, the term *judge-appellee* sufficiently serves our purpose.

Judicial appeals therefore they would be, if one appeal from a final or interlocutory sentence, from an order of the judge appointing too short or limited terms, from the ruling out of some evidence or plea or challenge, from the admission of incompetent witness, etc. An appeal is extrajudicial when it is made from extrajudicial acts of the superior or judge.[1] In the strict judicial sense this ought never to be called an appeal simply, as that always means a judicial one, but rather informal appeal or *provocatio ad causam*, i.e. legal application for redress. To use the word *recourse* (*recursus*) for extrajudicial appeal, as a few seem inclined to do, is confusing. Recourse in its legal sense differs from an informal appeal and may be had only where neither a judicial nor an extrajudicial appeal lies. Again, an extrajudicial appeal is a formal proceeding subject to conditions and formalities defined by law, while a recourse is a plain and informal act. Hence an extrajudicial appeal goes through the regular order of the higher instances, but a recourse lies directly to Rome. Finally, an extrajudicial appeal may have devolutive and suspensive effect, neither of which belongs

[1] When reading older Latin canonists a little confusion in this matter of extrajudicial appeals may sometimes arise from the fact that they use the word *judex* indiscriminately for one in authority, whether he be at the same time *judge* in the strict sense or not. Hence *Grandclaude* in tit. de officio Judicis Ordinarii, X., very opportunely remarks: *Judicis nomen hic latius sumitur, scilicet pro eo omni qui exercet jurisdictionem. Nam judex et jurisdictio, quoad vim nominis, sunt correlativa.* Hence to avoid mistakes when studying the canons and their commentators on extrajudicial appeals, we must discard the idea that *judex* frequently calls forth in us. *Pierantonelli* generally uses the term *praelatus* instead of *judex*.— Another cause of confusion is the wider and indiscriminate use of the term *appellare* and even *appellatio* by which sometimes not only the older commentators but the sacred canons themselves indicate any recourse, formal or informal, to a higher authority. On appeals consult the *Commentators*, l. II. tit. 28; *Bouix*, II. p. 246; *Rota*, n. 787 sqq.; *Pierantonelli*, tit. v. n. 32 sqq.; *Smith*, II. 1207, and especially *Stremler*, p. 369 ff.

to a recourse. Devolution in the latter case is merely *per accidens.*[1]

The main difference between a judicial and an extrajudicial appeal is in regard to the suspensive effect. By a judicial appeal the jurisdiction and orders of the judge-appellee may often be suspended at once by the mere notice given of the appeal, and any further acts of his become thereby attentats; but an extrajudicial appeal has no such suspensive effect before the appellate jurisdiction has ordered the retrial.[2] Hence, the decisions and orders of the inferior authority are valid and may be executed before that time, but not while the case is being renewed. With regard to other conditions and formalities, they are substantially the same whether the appeal be of the one or the other kind.[3]

106. When either of the parties in a trial is dissatisfied with the judgment he may appeal to the competent higher court for reversal. But the judge himself who rendered the final sentence, can no longer change or retract it, except on a plea of nullity (see n. 113). Leaving this aside, the condemned party may claim that the judgment, although formally valid in law, is yet materially unjust or unfair; that the law itself has been wrongly applied in the case; that the judgment is not sufficiently

[1] For these reasons we choose to follow *Pierantonelli*, tit. 5, n. 33, and to distinguish between recourse and extrajudicial appeal. *Recursus* as a technical term in Canon law seems of recent origin. It is of the same kind as in the language of older canonists the *supplicatio*, a complaint or a grievance with the prayer for redress. See n. 112.

[2] *Santi*, h. t., n. 3. We suppose, though, that such an effect would follow only upon an inhibition issued, *when allowed*, by the superior jurisdiction. Canon law and commentators deal extensively with *inhibitions*, by which term is meant an order issued by the higher jurisdiction upon appeal to stay proceedings of the lower one against the appellant.

[3] For this reason and to avoid repetition we omit the author's chapter on extrajudicial appeals. What is here said on judicial appeals applies equally, *mutatis mutandis*, to extrajudicial ones.

supported by the evidence; that the sentence is too severe and undeserved, etc. Against such grievances he may seek redress by an appeal to a higher instance only, but never, as is evident, by recourse to a court of the same or perhaps even lower jurisdiction. An appeal is granted only twice as a rule, that is, from the episcopal to the metropolitan, and from this to the papal court, but in no case can there be three appeals.[1]

The appeal being a benefit of the law is consequently subject to the restrictions imposed by the law upon the right of using it.[2] Only the highest jurisdiction, the Pope, can declare an appeal inadmissible either in certain causes, or also in a particular case.[3] But where an appeal is allowed, the aggrieved party may renounce this benefit of the law either expressly by a written or a sworn oral declaration, or tacitly by default. But the cleric convicted in case of contumacy cannot avail himself of it in punishment for his contempt of the court.[4] The appeal

[1] cc. 39, 65, X., II. 28 ; 1 Clem., II. 11. See, however, p. 40, note 2.

[2] These restrictions are tersely expressed in the following verse, which *Reiffenstuel*, h. t., n. 269 sqq , fully explains :

> Appellare vetant scelus, excellentia, pactum,
> Arbitrium, fatale, aut si dilatio nulla,
> Clausula quae removet, res quae notoria constat,
> Corrige, contemptus, possessio, jus quoque clarum,
> Post executio, minima, et res longius acta.

[3] Cfr. the Roman answer, 13 July 1886, in *Appendix*, p. 241. Canonists (*Reiffenstuel* h. t., n. 279 sqq.; *Schmalzgr.*, h. t., n. 29 sqq.) dispute much on the force of that famous clause : *omni appellatione remota*, whether it occurs in a papal rescript (c. 53, X., h. t.) or in a general statute. *Rota*, n. 816, maintains that it does not affect those cases where the right to appeal is expressly stated in law, and that in regard to others it merely does away with the suspensive force of the appeal. *Santi*, h. t., n. 13, 14, seems to think that it forbids an appeal altogether, whether suspensive or only devolutive, except in the cases mentioned in the law, and that it only leaves the choice of some extraordinary means of redress (see *infra*, 112 ff.).

[4] See *Acta S. S.*, IV. 382, nota.

is allowed only against a wrong caused by a judicial or extrajudicial decision or order of the superior, but not a wrong done by the law itself. For, this would be the same as to impeach the law which was rightly applied against him, as in itself unjust. The appellant may at most maintain that the law applied in his case is no longer in force, that for some reason or other the present case does not come under this law, or that it falls under another, etc. Although the grievance, the wrong done by the judgment, is somewhat slight, an appeal may be taken against it.[1] Since the Council of Trent an appeal can be taken only from final judgments, or such interlocutory judgments as have the force of final ones, and from such grievances which cannot be remedied by the final sentence, e.g. imprisonment, etc.[2] An appeal is always presumed admissible until the contrary is proved. No appeal can be taken against a judgment that has obtained the force of law, i.e. become *res judicata*.

It is easily understood that where an appeal is legally excluded, e.g. by the lapse of the *fatalia* or because there is no higher instance, judgments obtain immediately the force of law as regards appeals.

107. The effect of an appeal is twofold, as a rule, suspensive and devolutive. A lawful appeal suspends

[1] *Alexander III.*, c. 11. X., II. 28. This, however, supposes that the wrong though slight be yet *real*, not a mere trifle or notion, but worht the while of such legal proceeding as an appeal is. Otherwise the appeal would be what the law calls a frivolous one, unreasonable, not taken on sufficient grounds nor for good cause (*justa, legitima*). Such sham appeals when taken for the purpose of evading the execution of the sentence, are called *frustratoriae;* when the purpose is simply to vex and incommodate the appellee they are said to proceed *ex calumnia*. It would be a frivolous undertaking to appeal against the law itself, or against a sentence that is evidently just and fair, or *in notorio*. No appellate court is ever justified in accepting frivolous appeals, but ought to strongly repress them.

[2] C. Trid., S. XXIV. c. 20, de Ref., Bened. XIV. *Ad militantis*, § 43.

the legal force of an otherwise valid judgment or order, prevents the execution thereof, and hinders the judge from taking any further action in that matter. The devolution by appeal consists in this, that henceforth the superior jurisdiction, the appellate judge, takes cognizance of the case in question and brings it into his forum, first to pass upon the admissibility and legality of the appeal, and if admitted to decide eventually the issue itself, to affirm, modify or annul the judgment of the lower court. The appeal when admissible has always a devolutive, but not always suspensive effect. In general it may be said that appeals against sentences which impose a purely vindictive punishment have suspensive effect, while appeals in matters of mere correction and administration have only a devolutive effect. This important matter is minutely regulated in the bull *Ad militantis* of Benedict XIV.,[1] which is binding and in force to this day (*Instr.*, art. 37). According to that constitution an appeal will have no suspensive effect in the following matters and affairs:

1st. The holy sacrifice of the mass, the sacraments, preaching and Christian doctrine, the care of souls, divine worship and public devotions.[2]

2d. Refusal, recall, suspension, restriction, and limitation of the faculty to hear confessions, especially those of regulars and nuns.[3]

3d. Suspension and privation on account of incorrigibility, and the consequent appointments of substitutes and vicars *in spiritualibus*;[4] censures against concubinage and violation of the privilege of the clergy;[5] censures

[1] See *Appendix*. This famous constitution is truly a codification of all the former laws and decisions in matters of appeal. See § 4.

[2] §§ 6, 7, 8, 18, 19, 31. [3] §§ 15, 20, 21.

[4] § 12. We call special attention here to *C. Pl. B. III.*, n. 286.

[5] §§ 25, 26.

latae et ferendae sententiae generally, if not appealed from on account of nullity;[1] sequestration and subtraction of revenues in case of those who violate the law of residence.[2]

4th. In general the *correctio morum* of the clergy, secular and regular, especially when made during the canonical visitation;[3] appointment of curates and assistants, or of vicars and substitutes;[4] division of parishes, erection of new ones, regulation of boundaries between them; administration, translation, and union of benefices; restoration of church buildings, and all financial affairs.[5]

An important consequence of the suspensive effect of an appeal is that all further proceedings by the lower jurisdiction in the matter appealed against become so many attentats in law[6] when instituted either within the ten days allowed for the appeal, or after the notice given of the appeal, or after an inhibition decreed by the appellate superior. A peculiar effect of a judicial appeal is that appellant may recuse as suspect the judge from whom he appealed, if pending the appeal he should be summoned for trial in the same court to answer upon another charge.[7] But if he obey the summons and is willing to be tried before the same judge, the proceeding is valid, nor can he afterwards appeal on a plea *de judice suspecto*. Moreover, proceedings on the principal issue must be stopped upon appeal from an interlocutory judgment given on such an incidental question, which if not

[1] §§ 23, 36. [2] § 14. [3] §§ 19, 20, 21, 24, 25, 26.
[4] §§ 9, 10, 11, 12, 17. [5] §§ 13, 16, 17, 22, 28, 29, 30, 32, 34, 35.
[6] c. 7, in 6°, h. t. Such acts are called attentats (*attentata*) to indicate that they are mere attempts devoid of any legal force or effect, and that, moreover, they are unlawful attacks upon the safety and immunity of the appellant granted by the law, which demands that pending an appeal *nihil innovetur*. Cfr. *Reiffenstuel*, h. t., n. 249 sqq.
[7] cc. 6, 24, X., h. t., except in case of a manifest crime.

first decided and settled may prejudice the main issue and materially affect the final judgment.[1]

108. The proceedings in case of appeal are very simple. The appeal is entered[2] with the judge-appellee. If entered at the same sitting of the court when judgment is given, the appeal may be entered by word of mouth or in writing, but at any other time it must be in writing. In the first case it is enough to say, "I appeal," or any other words that will clearly and unequivocally express the intention of recourse to the higher court.[3] Notice of the appeal so taken must at once be entered on the minutes. But if notice of the appeal be given in writing, appellant must clearly designate himself as such, and in particular give the names of the judges *a quo* and *ad quem*, and the judgment, order or decision against which he appeals. Appeals from interlocutory and extrajudicial judgments must be made in writing and moreover state the grounds of the complaint or grievance; for in this case the judge-appellee himself may at once modify or set aside his former decision.[4]

The appeal must be entered within ten days from the moment when judgment was officially intimated to the defendant.[5] This peremptory term has ever been the

[1] *Rota*, n. 8, 14; *Santi*, h. t. n. 35.

[2] *To enter an appeal* means to give notice to the judge (or to the bishop in extrajudicial appeals) that the matter at issue on which judgment or some ordinance had been given by him, is to be removed to a higher jurisdiction for reversal. Hence, it is always entered with the judge-appellee. Notice of such an appeal already entered must then be given to the higher court by the lower one in the so-called *apostoli*. Only after the higher court has become satisfied that the appeal is lawfully taken in matter as well as in form, may appellant *prosecute the appeal*, that is, institute, as plaintiff now and no longer defendant, judicial proceedings before the appellate court.

[3] cc. 34, 52, X., h. t.

[4] c. 59. X., II. 28.

[5] *Instr.*, art. 38. This is the first term in appellate proceedings. The next is a term of thirty days to demand the dimissory letters. The third

same since Justinian till the present day and is the general rule of Canon law.[1] Attempts have always been made to take appeals after that legal term had expired, but numberless decisions prove that the S. Congregations have uniformly refused to entertain them. The law allows exceptions only where it was impossible for defendant to enter the appeal within the term fixed, whether the obstacles were of a physical or a moral nature, e.g. error,[2] fear,[3] etc.[4]

If the inferior judge do not accept the appeal or seek to prevent it by threats or other means, the appellant may lodge the appeal with the higher court upon affidavit by witnesses that he tried, though without success, to enter the appeal in the lower instance; or if appellant start within ten days on a journey to the appellate judge, it will be equivalent to an appeal.[5]

The judge with whom the appeal is entered must inquire only as to certain formalities, whether it be admissible in law, whether it was lodged within the ten days, and in writing and with the required data, viz. the names of appellant, appellee, appellate judge, and the judgment appealed from. But he has no authority to examine and decide the matter itself, or whether his judgment be actually based on some error of fact or law, whether appellant may obtain a reversal or not.[6] In fact he must refrain from exercising any further jurisdiction in the case until

is the time appointed when appellant must open the case (*intraducere appellationem*) in the appellate court. The last term is the time when the trial must be ended, that is, one year as a rule, or two at most. These terms were fixed by the law in order to prevent interminable trials, and to secure justice against fraudulent delays. For this reason they are peremptory. The last moment of any one of these terms, if wilfully neglected, puts an end to the appeal once for all, it is absolutely fatal. Hence, they are called in law *fatalia appellationum*. *Reiffenstuel*, h. t., n. 152 sqq.

[1] *Rota*, n. 805. [2] c. 69. X., h. t. [3] c. 73. X., h. t.
[4] *Rota*, n. 806. [5] c. 52, X., h. t. [6] 21 Mch. 1854. AJP., xx. 158.

settled. If, however, the appeal is merely interlocutory,[1] the judge may proceed in the matter after having modified or reversed the order to the satisfaction of the appellant.[2]

109*. Canon law formerly fixed a term of thirty days from the time appellant was notified of the judgment or decision, within which he had to ask for the apostles.[3] Until a certain day appointed by the lower court he had to present these apostles to the appellate judge. One year was given him to prosecute the appeal and have the cause decided.[4] But the new Instruction, as *Rota*, n. 851, truly says, differs not a little from the former custom. According to art. 39, appellant need not demand the apostles, but after the appeal is entered the court will at once send all the original (*autographa*) acts,[5] i.e. the procès-verbal, the auditor's summary, the written defence

[1] And also if extrajudicial.

[2] c. 60, X., II. 28.

[3] *Apostoli* (*libelli dimissorii*) are letters to the appellate court by which the judge with whom an appeal is lodged certifies that the appeal was made in proper time and legal form. They may be simply *dimissory* letters by which the judge dismisses the whole cause to the appellate court, because he considers the appeal well taken. Or they may be *reverential*, stating that he sends the case up on account of his deference and respect towards the higher authority, but not because of the admissibility or any solid ground of the appeal. Finally, these letters may be *refutatory*, by which he simply attests the appeal entered, but at the same time protests, for reasons assigned, against its being entertained by the higher court. Cfr. *Reiffenstuel*, h. t., n. 124 sqq.—Article 39 of the *Instructio* does not prevent the bishop in case of appeal from sending letters of the one or other kind, or any other comments and explanations, along with the acts. Cfr. *C. Trid.*, S. XXIV. c. 20, *de Ref.*

[4] These and other rules of the general law are fully explained by *Droste*, but we omit this part as rendered impracticable by the *Instr.*

[5] Formerly, as *Droste* observes, a copy or transcript of the original acts was given under seal to the appellant, who would then himself send it to the higher court. By a law of Clement VIII., a.1600, the originals were to be sent only if a plea was made during the appellate trial that the transcript had been forged and could not be relied upon.

(also, we think, the prosecutor's final charge), and the sentence to the appellate judge; who must without delaying too long take proper cognizance of the appeal (art. 40). He must then inquire whether the appeal is admissible in law and made in proper time and form. If satisfied of its full legality he will notify the appellant through the lower court [1] that within twenty days [2] from this notification he must appoint an attorney for his defence, to be approved, however, by the appellate court. This term is peremptory (art. 41); hence, if allowed by appellant to lapse without having complied with the order, he will be considered as having renounced the appeal. A decree of the appellate court to this effect will moreover lay the costs on him. The appeal then goes by default, and the judgment of the first court becomes *res judicata*. But if he prosecute the appeal in proper time, the appellate court will fix the time for the opening of the case.

110. The judicial trial or procedure in the appellate court is the same as that in the first court (*Instr.*, art. 42). We may remark, moreover, that the whole cause or issue, the same as tried in the first instance, goes up and may be tried again in regard to law as well as fact. Appellant must, therefore, present to the court in writing the reasons and grounds of his appeal together with the evidence to support them.[3] They must also be communicated to the appellee, who may on his part look for and produce counter-evidence. If the facts as found in the first trial are not denied by the appellant, a review or new trial is not necessary, and judgment may be based upon the former acts.[4] But if appellant demands a new finding

[1] *Rota*, n. 851.

[2] *Cum Magnopere*, art. 39. gives thirty days.

[3] c. 3. in 6°, h. t.; c. 70, X., h. t.

[4] That is, matters of law merely will be examined, as in Common law, upon a writ of error.

of facts and further testimony, it should ordinarily be granted. The appellate judge may in that case appoint an auditor to institute new proceedings. If the judgment of the first instance be declared void on account of essential defects in the procedure, the case must be sent back for a new trial. Otherwise the former judgment is either affirmed or reversed.

111. With regard to the absolution from censure in case of appeal made against them, clear and definite rules were laid down by Popes Clement VIII. and Benedict XIII.[1] If the appellate judge find the censures clearly unjust, he will himself absolve the appellant. If the censure is just and deserved, appellant must be sent back in order that, having given signs of amendment, he may humbly ask absolution from the bishop who inflicted the censure. When, however, the justice of the censure is doubtful, then it is more appropriate (*honestius*) that the appellate judge request the bishop to grant absolution within a definite, short time, though he may also himself absolve the appellant. Should he order the absolution with the clause *cum reincidentia* (the effect of which is that the person thus absolved will in case of disobedience to the court immediately reincur the censure), the appellant must address himself to his bishop with that order and pray for the absolution. If he is not absolved within three days, as stated in the writ or commission, any approved confessor may absolve him *juxta commissionis formam.*

Each case brought before the appellate court should be finally decided in one year if possible; at least they should never drag on over two years.[2]

[1] In *Collect. Lac.*, vol. I. pp. 427 ff., 529 ff.

[2] 23 Jan. 1880. *Acta S.S.*, XII. 635. On appellate procedure before the S. C. Epp. at Rome, see the decrees in *Appendix*, p. 235 ff.

CHAPTER IV.

EXTRAORDINARY MEANS OF REDRESS.

112. The object of criminal procedure is to serve truth and justice. In the search for truth, however, man often errs, especially where prejudice and passion reign. To restrain these as much as possible and to do all that man can to come at least near the truth, there are legal rules and norms and forms of judicial procedure, the prosecution and the defence, the examination of witnesses, the legitimation of the process, offensive and defensive pleading, and, lastly, the appeal. Neglect of material forms will entail nullity of proceedings. Yet after the canonical trial has wound its way through all these stages and even passed the highest instance, still some one error may be left undiscovered; judgment may yet be false and the punishment imposed unjust. For this reason it has well been said that no criminal sentence ever becomes irrevocably law (*res judicata*). For no punishment must be inflicted for crime erroneously presumed, or which is not fully deserved. Hence, when we speak of the absolute validity of a criminal sentence, we only mean that it can no longer be set aside by the ordinary means of the law and that consequently it must be executed. What, then, are those other means by which a judgment that has full and absolute force in law, can be reversed or its execution stayed?

The first of these extraordinary legal remedies is *the recourse*,[1] a written petition to the highest authority, the Pope, praying him to order in virtue of his supreme power a rehearing of the cause already decided but now

[1] See *supra*, n. 105.

unappealable. The petition was formerly called *supplicatio*, and the retrial or review of the case *retractatio;* both are often used indiscriminately. Modern jurists prefer the term *revisio.*[1] A revision of a finally adjudicated issue can be granted by the Pope alone, who will do so only for the gravest reasons which are first to be examined in a plenary session of the S. Congregation.[2] A revision of decisions given by the Pope or a general Council will not be granted.

Neither the recourse nor the consequent review have any suspensive effect. The first judgment may be executed; it may be suspended if within ten days notice of the recourse is given to the judge who tried the case. Revision will be granted only once in the same cause.[3]

113. From the recourse we must distinguish the *querela nullitatis*,[4] the complaint of nullity, by which complainant avers that the decision of the bishop, judicial or extrajudicial, is simply null and void.[5] This complaint can be lodged with the first court, who may, after examining the objections and finding them true, make a declaration to that effect and put things back *in statu quo*. Or it may at once be taken to the higher court,[6]

[1] *Reiffenstuel*, l. II. tit. 28, n. 18 sqq.

[2] Cfr. the decree S. C. Epp. 1835, art. 14, in *Appendix*.

[3] Although our modern *recursus* in Canon law is really the same as Justinian's *supplicatio*, yet it does not necessarily lead to a *retractatio* in the strict sense. Rome may take up the matter there, as in case of an appeal, to give it a regular trial or only to review the questions of law implied; she may appoint a referee, residing in Rome or at the place of petitioner, to report on the case; she may provide in any other way that she thinks best under the circumstances. Like our recourse, the *supplicatio* was an absolutely informal and extrajudicial proceeding.

[4] *Reiffenstuel*, l. II. tit. 28, n. 23 sqq.; tit. 27, n. 135 sqq.

[5] Null and void is every *sententia contra leges canonesve prolata* (Gloss). Judgment may be void on account of incompetency, or because of irregular proceedings, or through a substantial error. See *Rota*, n. 854.

[6] This is the prevailing practice.

whose decision will be always conclusive. No special legal forms need be observed in making the complaint, nor is it limited to any certain time.[1] It also has a suspensive effect.[2] If the complaint of nullity is sustained, the case will be tried again in the first court.[3]

In a wide sense we may class with the complaint of nullity a proceeding exclusively observed in civil matters and known in Canon and Civil law as *restitutio in integrum*,[4] that is, reinstatement or complete return of things to their former state. A complaint of nullity in disciplinary and criminal cases may have a similar effect. For instance, where judgment in contumacy was rendered against a person being on a distant journey and therefore legally excused because unable to appear; also when of two witnesses who were considered competent and by whose testimony defendant was convicted, one or both are afterwards proved to have sworn falsely; or when the document on whose evidence judgment was based, turns out to be a forgery; again, when the judge has warped and misused the law; when the defender has betrayed his client; when the person convicted produces new and full evidence of his innocence,—in such cases judgment must be reversed as null and the condemned

[1] The judgment being assumed to be null can never obtain force of law; for, says the Gloss, "nothing has no qualities." Cfr. *Acta S. S.*, XVII. 156, 582.

[2] Not exactly. Canonists in l. II. (*Reiffenstuel*, tit. 28, n. 26; *Schmalzgr.*, tit. 27, n. 109; *Rota*, n. 854) commonly teach that the plea of nullity has no suspensive force and consequently will not stay the execution of the judgment, except in case of such a criminal sentence that once executed could not be remedied even if afterwards proved to have been void.

[3] Not necessarily. An examination of the grounds on which the complaint of nullity is raised may show that there is no cause at all or no sufficient one to institute a trial, and that things should rather be left as they were before the first proceeding; which might in a sense be called a reinstatement.

[4] See *Commentators* in l. I. tit. 41.

party reinstated.[1] Cases of the kind are so various that it is impossible fully to enumerate and classify them.

Finally, we may observe that complaints may be made against the judge for denying some right, delaying the proceedings and similar causes; against the officers of the court for chicanery, etc. Such complaints will ordinarily be addressed to the immediate superiors of those whom they concern.

114. In connection with our subject we must necessarily mention *the abolition*,[2] by which we understand here the withdrawal or dismissal of a criminal cause on the part of the proper authority. This may be done in three ways: before the formal charge, during the trial, and after the sentence.

The Ordinary has always the right to make informal inquiries at any time either in person or through others, cleric or laic. Not to speak of his rights and duties as pastor of the flock, such private inquiries every person, the bishop too, can make; for every one may inform himself of what another is doing, though that other one happen to be an ecclesiastic. Yet we do not assert that such inquiries can never be wrong or sinful. Thus when

[1] *Acta S. S.*, VIII. 614.

[2] Abolition is a term of Civil, not of Canon law. It comes nearest to what in Common law is called "to quash the proceeding." Sometimes its effect is the same as that of an "arrest of judgment," or of a "nolle prosequi;" and when referring to the execution of a sentence it acts like a "pardon." As a kind of abolition we may also take what is called in Civil and Canon law "a transaction," or "a compromise" in Common law. Transaction in the strict sense is "an agreement made for consideration (*conventio non gratuita*) by which parties settle a dispute or a judicial suit between them." In the latter case it had to be made before judgment became conclusive or absolutely final. *Commentators* in l. I. tit. 36, *de transact.*, inquire whether Canon law allow such a compromise in a criminal trial (cfr. compounding a criminal offence), and answer by denying it, except the crime be punishable by what Canon law considers equivalent to a capital sentence; e.g. excommunication, degradation, perpetual infamy, etc.

official persons make such inquiries (especially when they have come a great distance for the purpose) it very easily causes excitement and suspicion among the people by which the reputation of the priest may be injured. Against such an inquiry, imprudent and indiscreet and only giving rise to scandal, every priest would rightly complain to higher authority.

Private and extrajudicial inquiries the bishop has a right, whatever his reasons be, to stop at any stage and without bringing a charge even where that could be done. This as far as the priest is concerned. But whether as bishop and *pastor animarum* he act wisely in thus arresting further inquiry and possibly a criminal charge, is another question. It might even be a case where the rest of the clergy, the congregation, or a private person has a right to demand that disciplinary or criminal proceedings be instituted, and where, if refused, they are bound to lodge a complaint against the bishop with the higher ecclesiastical authority.

Criminal proceedings once begun must be carried to the end, to acquit or to condemn. The bishop having opened those proceedings certainly not because defendant appeared innocent, but because there were some grounds to suspect him guilty, is in justice bound to carry the matter through; for, the accused if innocent, as he may be, has now a right to a public judgment in his favor. Besides, crimes and criminal procedure are in the Church as in the State objects of the public law. Hence the bishop has no right to stop criminal proceedings begun for cause, even if the accused did consent, except where higher interests demand it. By the accusation the honor and good name of the ecclesiastic, which is to him as necessary for efficient labor as his life, is attacked. But as life is not at his own disposal, neither is his honor nor his reputation. Higher interests may be involved. If, e.g.,

the State or people threaten to interfere; or if the bishop himself would be drawn into difficulties and possibly lose the high respect due to his office and authority,—such consequences would be far more injurious to the faithful of the diocese than if the reputation of the pastor of some small district were to suffer by leaving his cause untried. In such cases judicial proceedings may be quashed, especially as any injury may be to some extent or even fully repaired by transferring the accused to another place.

An unlimited right to arrest criminal proceedings at any stage, even contrary to defendant's wishes, belongs exclusively to the Pope as supreme legislator and judge. This right he has often used for the good of the Church.

With regard to the punishment imposed by judicial sentence, the bishop has no power to remit it, for this would be equivalent to a reversal;[1] but no court can reverse its own final sentence; nor can the bishop do it, even when the matter is not yet definitely adjudicated.[2] Still the bishop has the power to commute one disciplinary punishment with another,[3] for its purpose is simply

[1] Not at all. The sentence may remain on record without being reversed. But for cause the punishment may be remitted. In giving sentence the bishop would act as judge, in remitting the punishment as legislator. It would simply be a pardon. The question, therefore, is this: can the bishop pardon a cleric legally sentenced? We distinguish: if the offence was committed against the bishop's own laws or diocesan statutes, he certainly can; if the offence was against a general law of the Church, he cannot do it. Pardon in this case is reserved to the Pope. *Bizzari*, p. 181, cites the following decree, 8 Jan. 1858: "SSmus declaravit dispensationem a poenis inflictis per sententias latas a tribunalibus criminalibus curiarum episcopalium reservatam esse Summo Pontifici; et idcirco episcopos ab hujusmodi dispensationibus concedendis abstinere debere." There is no conflict between this decree and the opinion just expressed.

[2] S. C. Epp., 8 Jan. 1858. AJP., XIII. 53.

[3] 26 June 1854. AJP.. XX. 159.

to correct. When delinquent is thoroughly reformed, the object of the punishment is attained. Such punishment is sometimes imposed for an indefinite period; its remission is therefore shown by the very sentence to be conditional upon the amendment and good conduct of the delinquent.

The Pope alone, as sovereign and head of the Church, has the full right to pardon or to stay the execution of any sentence.[1]

CHAPTER V.

EXECUTION AND COSTS.

115. A criminal sentence should not be executed[2] until it has obtained full force in law. The execution will be different according to the nature of the punishment imposed.

Censures begin to operate or exert their force at the same time as the sentence by which they are imposed; censures *latae sententiae* and those threatened by the judge are *ipso facto* incurred at the moment of the culpable act or omission. But in order that they may obtain their effect also in the external forum, it requires an official declaration that they have been incurred. By this the punishment is also executed *in foro externo*. Some vindictive punishments are executed in the same way, i.e.

[1] 28 June 1854. AJP., xx. 159. The AJP., xi. 604 ff., give an interesting case of an abolition by Benedict XIII., a. 1724, in the criminal trial of Bishop Andrea de Robertis.

[2] On the execution of judgments see *Commentators* in l. ii. tit. 27; *Bouix*, ii. 237. On canonical punishments see *Commentators* in l. v. tit. 37 sqq. Some good remarks on the subject see ap. *Rota*, n. 751 sqq.

simultaneously when sentence is pronounced. The sentence depriving one of Christian burial is put in execution by simply omitting such burial. Suspension, transfer, or removal from an office (*privatio beneficii*) leaving one eligible for another, deposition involving the loss of the rights of the priesthood as well as the jurisdiction but leaving the benefit of the clergy, are actually effected by the sentence, and non-submission is a new or rather continued offence whereby other punishments, e.g. irregularity, are sometimes incurred. All defamatory punishments bring irregularity with them. Degradation, i.e. the real degradation in solemn form, can be executed by the bishop only, who must associate with himself other bishops and abbots.[1]

116. It is a generally accepted principle that costs fall upon him who has caused them, that is to say, in case of conviction on the person condemned,[2] and in acquittal on the diocesan fisc, i.e. the bishop. The costs of the previous inquest fall likewise on the fisc if no trial followed.

Who shall pay the costs is generally stated in the sentence; nor are costs due before the sentence has become law (*res judicata*).[3] Till then each party pays his own

[1] *C. Trid.*, S. XIII. c. 4, de Ref. We omit *Droste's* remarks on banishment, prison, and corporal chastisement; also what he says of the aliments and pension to be given to a priest who has by the sentence been deprived of his benefice and his income. The matter has not yet been settled by a general law in this country. Cfr., however, *C. Pl. B. III.*, n. 72, and the answer of the S. C. de Prop. Fide, 4 Febr. 1873 ad I^m^ (*ibid.* p. 210). By what means and in what manner bishops may be able to effect the execution of their sentences even where the secular arm is not at their disposal, is stated by *Bouix*, II. 244; *Rota*, n. 760. On pecuniary punishments and fines cfr. *Lucidi*, I., c. 2, n. 206 ff.

[2] c. 5, X., II. 14; c. 7, X., V. 37. This principle covers the rule that whoever is condemned in contumacy must bear the costs. *Reiffenstuel*, h. t., n. 200.—*Commentators* generally treat of the costs in l. II. tit. 27, de sententia. See also *Bouix*, II. 242; *Pierantonelli*, tit. V. n. 31; *Smith*, II. n. 1201.

[3] 11 June 1833; 5 Sept. 1835. AJP., XX. 465, 468.

costs.[1] The accused pays the witnesses for the defence and his counsel's fees, while the fisc pays witnesses for the prosecution and other current expenses of the procedure proper. The officers of the court must await the issue before receiving fees. If defendant is acquitted he can recover the amount of his salary that was, perhaps, stopped during the trial;[2] in general he may recover for any damages.[3] The accused ecclesiastic has the right of defence if prosecuted, but if too poor to pay himself, his counsel's fees must be paid by the fisc, whether counsel was appointed *ex officio* or chosen by defendant. The same holds in case of a poor appellant or appellee.[4]

Beside these regular costs there are others[5] which must be borne without recovery by the party that occasioned them. They are those which are caused by chicanery or carelessness; e.g. when the accused unnecessarily delays or hinders the proceedings; when at his request unnecessary and irrelevant witnesses are called; or when he employs more counsel than he needs, etc. For copies of the acts defendant will have to pay himself, because he as well as his counsel may inspect the originals in the chancery.[6]

The costs of an appeal lost are borne by the appellant; if both parties appealed, costs ought to be divided in proportion. Poor ecclesiastics appeal free of costs.[7] Where a criminal conviction leads to a removal in punishment, the ecclesiastic so removed cannot be condemned for costs.[8]

[1] With the right to recover if acquitted or successful.

[2] 13 June 1826. AJP., XIII. 53. [3] 8 Mch. 1748. AJP., XI. 1124.

[4] 15 June 1854. AJP., XX. 160.

[5] Canonists usually distinguish between necessary (*legitimae, judiciales*) and optional (*voluntariae, delicatae*) expenses. The former comprise expenses entailed in the procedure as such, e.g. the auditor's, prosecutor's, clerk's, messenger's fees, indemnity of witnesses for travel, board, and loss of wages, fees for certified copies of documents, etc.

[6] 1 Sept. 1778. AJP., XX. 76. [7] Aug. 1721. AJP., XI. 512.

[8] April 1718. AJP., XI. 492, 156. We suspect that this decree refers

Sometimes those who accuse or denounce others, to have them criminally prosecuted, may be forced to give security first, and in case the accused be acquitted, to pay costs.[1]

The fees, fines, and other costs are not the same in all courts, especially in the lower ones. The old customary rates are still used.[2] If the bishop wishes to establish a new rate, which may be quite necessary on account of the general decrease of value in money, he ought as a rule to do it in synod, as Benedict XIII. decreed in 1725.[3] The rate thus established must then be approved in the provincial council, and lastly by Rome. For good reasons the bishop may submit the new rate to Rome at once.[4]

In the Roman Congregations the judges draw no fees. The cost of appeal there consists mainly in expenses for postage, printing, and commissions, and in attorney's fees.[5]

117*. We do not know whether a regular rate of the necessary judicial fees and costs (also for the *defensor matrimonii*) has been fixed in any diocese or province of our States since the last plenary Council. Although this canonical "tariff-question" does not demand immediate legislation, it may deserve attention by and by. Such a court tariff, we suppose, would come under decree 294 *C. Pl. B. III.*

While the *L'Ordinario* is absolutely silent on the question of costs, the *Cum Magnopere*, art. 44, reminds appellate courts not too easily to condemn the lower curia

to some particular case and does not warrant the general statement by the author.

[1] March 1722. AJP., XI. 592. 13 Sept. 1817. AJP., XX. 453.

[2] 15 Jan. 1740. AJP., XI. 1085.

[3] Pius VII., by an order of May 1st, 1823, instituted a committee of three cardinals to revise the former tariff of judicial fees and taxes in accordance with the conditions of that time. AJP., XII. 999, 831.

[4] AJP., XI. 412. [5] AJP., I. 2423.

in costs, as no bishop is supposed to begin judicial proceedings except the preliminary inquest have furnished good reasons for doing so. Only if the bishop should put a cleric on a criminal trial *ex vera et propria calumnia*, i.e. rashly or upon a mere suspicion, could he be condemned for costs.[1]

[1] See *Commentators* in l. v. tit. 2, de calumniatoribus. *Calumniam et audaciam temere litigantium condemnando in expensis*, etc. c. 4, X , v. 37. Such rash procedure is called *calumnia* because it is a false accusation rashly and therefore maliciously made. Some interesting questions concerning costs in case of *male judicantis* or *temere litigantis* are found in *Schmalzgruber*, h. t., n. 110 sqq.

APPENDIX.

INSTRUCTIO 1880.

Istruzione

Alle Curie Ecclesiastiche sulle forme di procedimento economico nelle cause disciplinari e criminali dei Chierici. .

Questa S. Congregazione dei VV. e RR. maturamente considerando la presente condizione della Chiesa, quasi da per tutto impedita di spiegare l'esterna sua azione sulle materie e persone ecclesiastiche, e riflettendo anche al difetto dei mezzi atti all'organizzamento regolare delle Curie, è venuta nella determinazione di autorizzare espressamente gli Ordinarii a far uso delle forme piu economiche nell' esercizio della loro disciplinare giurisdizione sui Chierici. Et affinchè resti salva ogni ragione della giustizia, e si mantenga la canonica regolarità ed uniformità dei procedimenti, re-

Instruction

For Ecclesiastical Tribunals on the Forms of Summary Procedure in Disciplinary and Criminal Causes of Clerics.

This Sacred Congregation of Bishops and Regulars, after maturely considering the present condition of the Church, which is impeded on every hand from bringing her external action to bear on persons and things ecclesiastical, and taking also into account the lack of proper facilities to organize regular ecclesiastical courts, has come to the conclusion expressly to authorize bishops to proceed in a somewhat summary manner in the exercise of their disciplinary jurisdiction on clerics subject to their jurisdiction. But in order that substantial justice may be secured and canonical regularity and

APPENDIX.

INSTRUCTIO 1880.

Instructio

Pro Ecclesiasticis Curiis quoad modum procedendi oeconomice in causis disciplinaribus et criminalibus clericorum.

Sacra haec EE. et RR. Congregatio, mature praesenti Ecclesiae conditione perpensa, quae pene ubique impeditur, quominus externam explicet suam actionem super materias et personas ecclesiasticas, et considerato quoque defectu mediorum aptorum pro regulari curiarum ordinatione constituit facultatem Ordinariis locorum expresse concedere, ut formas magis oeconomicas adhibere valeant in exercitio suae disciplinaris iurisdictionis super clericis. Ut autem tota iustitiae ratio sarta tectaque maneat, serveturque processuum canon-

Instructio S. C. de Prop. Fide.

De modo servando in cognoscendis et definiendis causis criminalibus et disciplinaribus Clericorum in Foederatis Statibus Americae Septentrionalis.

CUM MAGNOPERE hujus S. Consilii intersit in ecclesiasticis judiciis eam methodum servari quae et temporum circumstantiis opportune respondeat, et regulari justitiae administrationi nec non Praelatorum auctoritati tuendae querelisque reorum praecavendis par omnino sit, placuit iterum ad examen revocari ea omnia quae in hac re pro ecclesiis Foederatorum Americae Septentrionalis Statuum in Instructione diei 26 Julii anni 1878, *nec non in responsione ad dubia circa eamdem posterius proposita continebantur. Itaque S. C. omnibus mature perpensis, SSmo. D. N. Leone*

puta opportuno di emanare le seguenti norme a cui le Curie devono attenersi.

I. L'ORDINARIO ha l'obbligo pastorale di curare la disciplina e correzione dei Chierici da se dipendenti, vigilando sulla loro condotta, ed usando i rimedi canonici per antivenire, ed eliminare disordini fra i medesimi.

II. Questi rimedi altri sono *preventivi* ed altri *repressivi* e medicinali. I primi sono diretti ad impedire che il male avvenga, a rimuovere gl'incentivi di scandalo, le occasioni volontarie, e le cause prossime a delinquere. I secondi hanno per iscopo richiamare i colpevoli a buon senno, e riparare le conseguenze del loro reato.

III. Sta alla coscienziosa discrezione dell'Ordinario l'applicar questi rimedi a tenore delle prescrizioni canoniche secondo la gravità dei casi e delle circostanze.

IV. Tra le misure preservative si annoverano princi-

uniformity maintained in all trials, it is at the same time deemed opportune to publish the following method of procedure as obligatory on all ecclesiastical courts.

I. It belongs to the pastoral duty of the Ordinary to look after the discipline and correction of his clergy, to watch over their conduct and by canonical means to endeavor to prevent or eliminate abuses among them.

II. Of these means some are *preventive*, some *repressive* and corrective. The former are intended to prevent the occurrence of evils, to forestall scandal, remove voluntary occasions and all proximate cause of delinquency. The latter are intended to bring back the erring to a sense of duty and to repair the evil effects of their misdeeds.

III. It is left to the conscientious discretion of the Ordinary to apply these remedies conformably with canonical rules according to the gravity of the cases and their circumstances.

IV. Among the preservative measures are chiefly

ica regularitas et uniformitas, opportunum censuit sequentes emanare normas a curiis servandas.

I. Ordinario pastorale onus incumbit disciplinam correctionemque clericorum a se dependentium curandi super eorumdem vitae rationem vigilando, remediisque utendo canonicis ad praecavendas apud eosdem et eliminandas ordinis perturbationes.

II. Ex his remediis alia praeveniunt, alia reprimunt et medelam afferunt. Priora ad hoc diriguntur, ut impediant, quominus malum adveniat, ut scandali stimuli, occasiones voluntariae, causaeque ad delinquendum proximae removeantur. Altera finem habent revocandi delinquentes, ut sapiant reparentque admissi criminis consequentias.

III. Conscientiae et prudentiae Ordinarii horum remediorum iucumbit applicatio iuxta canonum praescriptiones et casuum adiunctorumque gravitatem.

IV. Mediis, quae praeser-

PP. XIII. approbante, haec quae sequuntur observanda decrevit, praecedenti Instructione ac successiva declaratione abrogata, iis exceptis quae in hac continentur.

I. Ordinarius pro suo pastorali munere tenetur disciplinam correptionemque clericorum ita diligenter curare, ut circa eorum mores assidue vigilet, ac remedia a canonibus statuta sive praecavendis sive tollendis abusibus in clerum aliquando irrepentibus provide adhibeat.

II. Haec vero remedia alia praeventiva sunt, alia repressiva. Illa quidem ad praepedienda mala, scandalorum stimulos amovendos, voluntarias occasiones et causas ad delinquendum proximas vitandas ordinantur. Haec vero eum in finem constituta sunt, ut delinquentes ad bonam frugem revocentur, ac culparum consectaria e medio tollantur.

III. Conscientiae Ordinarii remittitur cujusque remedii applicatio canonicis praescriptionibus servatis pro casuum ac circumstantiarum gravitate.

IV. Praeventiva remedia

palmente il ritiro spirituale, le ammonizioni, e i precetti.

v. A tali provvedimenti deve precedere una verificazione sommaria del fatto; della quale è d'uopo che l'Ordinario tenga nota per poter procedere, se occorra, *ad ulteriora*, ed anche per darne conto all'Autorità superiore in caso di legittimo ricorso.

vi. Le canoniche ammonizioni si applicano o in forma paterna e segreta (anche per lettera o per interposta persona), ovvero in forma legale, facendone però sempre risultare da qualche atto la esecuzione.

vii. Riuscendo le ammonizioni infruttuose, l'Ordinario prescrive alla Curia che sia ingiunto al delinquente analogo precetto, spiegando in esso quello che il precettato debba fare o non fare, colla comminatoria della corrispondente pena ecclesiastica, nella quale incorrerà in caso di contravvenzione.

viii. Il precetto viene intimato al prevenuto dal Cancelliere innanzi il Vicario generale; oppure alla pre-

to be reckoned the spiritual retreat, admonitions and injunctions.

v. These measures should be preceded by a summary cognizance of the case; and of this the Ordinary shall retain a proper minute, so as to be able to proceed *ad ulteriora* if needs be, and to furnish proper information to superior authority in case of legitimate recourse.

vi. The canonical admonitions may be made in a paternal and private manner (even by letter or by an intermediary person), or in legal form, but always in such a way that proof of their having been made shall remain on record.

vii. Finding admonitions fruitless, the Ordinary commands the officials of his court to enjoin a similar precept on the delinquent, specifying what he is to do or not to do, and stating the corresponding ecclesiastical penalties which he will incur by disobedience.

viii. These injunctions are communicated to the accused by the chancellor in presence of the vicar-gen-

vant, praecipue accensentur spiritualia exercitia, monitiones et praecepta.

v. Has provisiones praecedere debet summaria facti cognitio, quae ab ordinario notanda est, ut ad ulteriora procedere, quatenus opus sit, et certiorem reddere queat superiorem auctoritatem in casu legitimi recursus.

vi. Canonicae monitiones fiunt sive in forma paterna et secreta (etiam per epistolam aut per interpositam personam) sive in forma legali, ita tamen ut de earumdem executione constet ex aliquo actu.

vii. Quatenus infructuosae monitiones evadant, Ordinarius praecipit curiae, ut delinquenti analogum iniungatur praeceptum, in quo declaretur, quid eidem agendum aut omittendum sit, cum respondentis poenae ecclesiasticae comminatione, quam incurret in casu transgressionis.

viii Praeceptum intimatur praevento a cancellario coram vicario generali; sive

sunt praecipue spiritualia exercitia, monitiones, praecepta.

v. Antequam vero ea adhibeantur, summaria factorum recognitio praecedat oportet: cujus notitiam Ordinarius servari curet ut, si opus sit, ad ulteriora procedere possit, et ut auctoritati ecclesiasticae superioris gradus in casu legitimi recursus totius rei rationem reddat.

vi. Canonicae monitiones vel secreto fiunt (etiam per epistolam vel per interpositam personam) ad modum paternae correptionis, vel servata forma legali adhibentur, ita tamen ut illarum executio ex aliquo actu pateat.

vii. Quod si monitiones in irritum cedant, Ordinarius jubet, per curiam delinquenti analogum praeceptum intimari ita, ut in hoc explicetur quid ipse vel facere vel vitare debeat, addita respectivae poenae ecclesiasticae comminatione quam si praeceptum transgrediatur, incurret.

viii. Praeceptum delinquenti a curiae cancellario coram vicario generali injun-

senza di due testimoni ecclesiastici, o laici di provata probità.

§ 1. L'atto si firma dalle parti che sono presenti, ed anche dal precettato, se vuole.

§ 2. Il Vicario generale può imporre ai testimoni il giuramento di conservare il segreto, se la natura del titolo, di cui trattasi, prudentemente lo richieda.

IX. In quanto poi alle misure *penali*, avvertano i reverendissimi Ordinari, che con la presente istruzione non s'intendono derogate le solennità dei giudizi volute dai sacri Canoni, Costituzioni Apostoliche ed altre ecclesiastiche disposizioni, ove queste possano liberamente ed efficacemente applicarsi; ma le forme economiche mirano a provvedere per quei casi e per quelle Curie, in cui non si possa o non si creda espediente attuare i solenni procedimenti. Rimane pure nel suo pieno vigore il rimedio stragiudiziale *ex informata conscientia* pei reati occulti, decretato dal s. Concilio di Trento nel cap. 1. sess. 14. *de Reform.*

eral; or in presence of two witnesses, ecclesiastics or laymen of approved integrity.

§ 1. The act will be signed by those present and by the accused likewise, if he will.

§ 2. The vicar-general can bind the witnesses under oath to observe secrecy if the nature of the case be such as to require it in prudence.

IX. As to the *penal* measures the Rt. Rev. Ordinaries will observe that it is not intended by this *Instruction* to derogate from the solemnity of judicial proceedings as required by the sacred canons, apostolical constitutions, and other ecclesiastical regulations, whenever that can be freely and fully carried out; this summary form is only granted to provide for those cases and those courts in which it would be either impossible or inexpedient to have recourse to the more solemn proceedings. In its full vigor then will remain the extrajudicial remedy *ex informata conscientia* for occult crimes, as decreed by the

coram duobus testibus ecclesiasticis aut laicis probatae integritatis.

§ 1. Actus subsignatur a partibus praesentibus et a praevento quoque, si velit.

§ 2. Vicarius generalis adiicere valet iuramentum servandi secretum, quatenus id prudenter expetat tituli indoles, de quo agitur.

IX. Quoad poenalia media, animadvertant reverendissimi Ordinarii, praesenti instructione haud derogatum esse iudiciorum solemnitatibus per sacros canones, per apostolicas constitutiones et alias ecclesiasticas dispositiones imperatis, quatenus eaedem libere efficaciterque applicari queant; sed oeconomicae formae consulere intendunt illis casibus curiisque, in quibus solemnes processus, aut adhiberi nequeant, aut non expedire videantur. Plenam quoque vim servat suam extraiudiciale remedium ex informata conscientia pro criminibus occultis, quod decrevit s. Tridentina Synodus in Sess. 14 cap. 1 de Reform., adhibendum cum illis regulis et gitur, aut etiam coram duobus testibus ecclesiasticis vel laicis spectatae probitatis.

1°. Actus injunctionis praecepti signatur a partibus praesentibus, et a delinquente etiam, si velit.

2°. Vicarius generalis jusjurandum testibus imponere potest de secreto servando, si prudenter a natura rei, de qua agitur, id requiratur.

IX. Quod vero pertinet ad remedia repressiva seu poenas, animadvertant Ordinari in suo pleno vigore manere remedium extrajudiciale ex informata conscientia pro occultis reatibus a S. Concilio Tridentino constitutum Sess. XIV., cap 1 de Reform.

da addottarsi con quelle regole e riserve, che ha costantemente osservate nella interpretazione di detto capo la s. Congregazione del Concilio in più risoluzioni, e in specie nella *Bosnien.* e *Sirmien,* 20 *decembre* 1873.

x. Dovendosi agire criminalmente o per contravvenzione a precetto, o per reati comuni, o per trasgressioni alle leggi della Chiesa, può essere compilato il processo nelle forme sommarie e senza strepito di giudizio, osservate sempre le regole sostanziali di giustizia.

xi. Il processo s'intraprende *ex officio*, o in seguito d'istanza, di querela, e di notizia in altro modo pervenuta in Curia. e si prosegue fino al termine nello scopo di raggiungere con ogni cautela e riservatezza il discoprimento della verità, e di aver cognizione tanto del delitto, che della reità od innocenza dell'accusato.

xii. La compilazione del processo può commettersi ad un probo ed idoneo Ec-

Council of Trent, Sess. xiv. *De Reform.* c. i., to be used subject to the rules and restrictions according to which that chapter was always interpreted by the S. Congregation of the Council in repeated decisions and especially that of *Bosnien.* et *Sirmien.*, Dec. 20, 1873.

x. When criminal proceedings are to be taken whether for violation of an injunction, for ordinary delinquencies, or a violation of the laws of the Church, the summary form without the judicial solemnities can be used, but always observing the essential rules of justice.

xi. Proceedings are instituted *ex officio* or as a result of an accusation, a complaint, or of knowledge reaching the diocesan *curia* by other means; and they are followed up with all caution and prudence for the purpose only of ascertaining the truth, and that the certainty of the crime as well as the culpability or innocence of the accused may be made manifest.

xii. The taking of the evidence may be intrusted to any approved and com-

reservationibus, quas constanter servavit pro dicti capitis interpretatione s. Concilii Congregatio in pluribus resolutionibus et praecipue in Bosnien. et Sirmien. 20 Decembris 1873.

x. Quum procedi oporteat criminaliter, sive infractionis praecepti, aut criminum communium, vel legum Ecclesiae violationis causa processus confici potest formis summariis et absque iudicii strepitu, servatis semper regulis iustitiae substantialibus.

x. In actione criminali vel ob praecepti inobservantiam, vel ob communes reatus, vel ob ecclesiasticarum legum transgressionem processus summarie et sine strepitu judicii servatis semper in tota sua substantia justitiae regulis conficiatur.

xi. Processus instruitur ex officio aut in sequelam supplicis libelli et querelae, aut notitiae alio modo a curia habitae, et ad finem perducitur eo consilio, ut omni studio atque prudentia veritas detegatur, et cognitio tum criminis, cum reitatis aut innocentiae accusati exurgat.

xi. Processus ex officio instruitur, vel accepto supplici libello, vel accusatione, vel nuncio quoquomodo ad curiam perlato, et usque ad terminum perducitur eo consilio, ut omni studio ac prudentia veritas detegatur, ac tum de crimine tum de reitate vel innocentia accusati causa eliquetur.

xii. Processus confectio committi potest alicui probo

xii. Ubi curiae iam constitutae sunt, compilatio processus committi potest

clesiastico, assistito dall'Attuario.

petent ecclesiastic, assisted by a clerk (secretary).

XIII. Ogni Curia è d'uopo che abbia il suo Procuratore fiscale nell'interesse della giustizia e della legge.

XIV. Per le occorrenti intimazioni o notificazioni, se non può aversi l'opera dei cursori della Curia, si supplisce con farle presentare da persona qualificata, che ne dia discarico; ovvero trasmettendole raccomandate per la Posta nei luoghi ove è in uso tale sistema postale, richiedendosene cer-

XIII. Each episcopal *curia* should have a fiscal procurator in the interest of law and justice.

XIV. If there be no messengers attached to the *curia* whose services could be available for the delivery of the summons and notifications, these can be sent by any suitable person, who must make a return thereof; or they may be sent by registered letter where such postal system exists, thus

atque idoneo ecclesiastico, adstante actuario.

probo ac perito viro ecclesiastico, cui assistat actuarius.

In dioecesibus vero in quibus curiae episcopales nondum possint institui, interim observanda est Instructio anni 1878 *cum responsione eam subsequenti ad proposita dubia. Videlicet singuli Antistites in synodo dioecesana audito clericorum consilio, quod tamen sequi non tenentur, quinque, vel ubi adjuncta rerum id fieri non sinant, tres saltem presbyteros ex probatissimis et quantum fieri poterit in jure canonico peritis seligant ad hujusmodi officium, ut in praedicta Instructione declaratum exstat, exercendum. Quod si ob aliquam gravem causam synodus haberi nequeat, quinque vel tres ut supra ecclesiastici viri per episcopum ad idem munus deputentur. Electi in officio manebunt usque ad proximam dioecesanae synodi celebrationem, in qua vel confirmentur vel alii eorum loco designentur. Quod si interdum morte aut renuntiatione vel alia causa praescriptus consiliariorum numerus minuatur, Episcopus audito consilio ceterorum ad commissionem pertinentium alios sufficiet. Porro commissio haec consultorum jurejurando obstricta tenetur ad officium fideliter adimplendum, et praeside Episcopo vel vicario generali rem suam aget. Defensio autem rei erit in scriptis exhibenda ad normam praesentis Instructionis.*

XIII. Unicuique curiae opus est procuratore fiscali pro iustitiae et legis tutela.

XIII. In qualibet curia episcopali procurator fiscalis constituetur, ut justitiae et legi satisfiat.

XIV. Quatenus pro intimationibus aut notificationibus haud praesto sit opera apparitorum curiae, supplетur exhibitione earumdem explenda per qualificatam personam, quae de facto certioret; sive eas transmittendo ope commendationis penes tabellariorum officium, illis in locis in qui-

XIV. Pro intimationibus vel notificationibus, si apparitores curiae desint, utatur Episcopus persona aliqua qualificata quae eas exhibeat, ac de hoc ipsum certiorem reddat: vel etiam a curia per publicos tabellarios commendatae (quibus locis hoc systema vigeat) transmittantur, exquisita fide ex-

tificato di presentazione, di ricevimento, o rifiuto.

xv. La base del fatto delittuoso può essere stabilita dalla esposizione che se n'è avuta in processo convalidata o da informazioni autentiche, o da confessioni stragiudiziali, o da testimoniali deposizioni: ed in quanto al titolo di contravvenzione al precetto, risulta dalla riproduzione del decreto e dell'atto d'intimazione eseguiti ne' modi espressi agli Art. VII. ed VIII.

xvi. A ritenere poi in specie la colpabilità dell'imputato è necessario di averne la prova legale, che deve contenere tali elementi da dimostrare la verità, o almeno da indurre una morale convinzione, rimosso ogni ragionevole dubbio in contrario.

xvii. Le persone che convenga di esaminare, si sentono sempre separatamente.

xviii. I testimoni a prova o a difesa, quando non vi si oppongano legali ostacoli, devono essere intesi con giuramento, estendibile, se occorra, anche all'obbligo del segreto.

securing a certificate of their presentation, acceptance, or refusal.

xv. The basis of the criminal fact may be established by the disclosures made during the trial supported by authentic informations, extrajudicial admissions, or the depositions of witnesses; and as regards the violation of injunctions, this is proved by simply producing the writ and the record of its having been served, as provided in Arts. vii. and viii.

xvi. Regarding in particular the conviction of the accused, it is necessary to have legal proof, which ought to be of such a nature as to demonstrate the truth, or at least induce such a moral conviction as to leave no reasonable doubt of the contrary.

xvii. The witnesses whom it is expedient to examine, should be all heard separately.

xviii. Witnesses for the prosecution or for the defence, if there be no legal obstacle, should be put under oath, and, if need be, held under oath also to secrecy.

bus hoc invaluit systema, exposcendo fidem exhibitionis, receptionis aut repudii.

xv. Basis facti criminosi constitui potest per expositionem in processu habitam, authenticis roboratam informationibus aut confessionibus extraiudicialibus, vel testium depositionibus, et quoad titulum transgressionis praecepti constat per novam exhibitionem decreti et actus indictionis, perfectorum modis enuntiatis Art. vii et viii.

xvi. Ad retinendam in specie culpabilitatem accusati opus est probatione legali, quae talia continere debet elementa, ut veritatem evincat, aut saltem inducat moralem certitudinem, remoto in contrarium quovis rationabili dubio.

xvii. Personae, quas examinare expediat, semper audiuntur separatim.

xviii. Testes ad probationem, aut ad defensionem, quoties legalia obstacula haud obsistant, sub iuramento audiri debent, quod extendi potest, si opus sit, ad obligationem secreti.

hibitionis atque acceptionis vel repudii. *Intimationes et notificationes semper in scriptis absolute fiant.*

xv. Delicti fundamentum erui potest ex ipsa expositione habita in processu, quae authenticis informationibus vel confessione extrajudiciali, vel testium depositionibus confirmetur : transgressio vero praecepti ex ipso decreto et actu intimationis ad normam art. vii. et viii. factae deducitur.

xvi. Ad admittendam vero rei culpabilitatem necessaria est probatio legalis, quae iis momentis constare debet, quibus veritas vere demonstrata elucescat, vel saltem moralis convictio inducatur quocumque rationabili dubio oppositi remoto.

xvii. Personae quae examini subiiciendae sunt, separatim audiuntur.

xviii. Testes ad probationem sive ad defensionem, si legalia impedimenta id non prohibeant, audiantur praestito juramento de veritate dicenda, et si res postulet, etiam de secreto servando.

XIX. I testimoni trovandosi lontani o in altra Diocesi, se ne domanda l'esame in sussidio all'Autorità ecclesiastica del luogo con invio alla medesima di un prospetto del fatto: e l'Autorità requisita corrisponde alla richiesta osservando le norme della presente Istruzione.

XX. Qualora vengano indicati testimoni per fatti e circostanze essenzialmente interessanti al merito della Causa, e non possano aversi in esame, perchè non si reputi conveniente d'intimarli, ovvero perchè invitati vi si ricusino, se ne fa menzione in atti, et si procura di supplire alla deficienza di essi con le attestazioni di altri testimoni che *de relato*, o in altro modo, siano informati di quanto si ricerca.

XXI. Riunito tutto ciò che sia necessario a stabilire il fatto et la responsabilità dell'imputato, viene questo intimato all'esame.

XIX. Witnesses at a distance or in another diocese shall be examined through the intervention of the local ecclesiastical authority, to whom shall be transmitted an abstract of the case; and the authority called upon, shall comply with the request, observing the norms of the present Instruction.

XX. When witnesses are offered to give testimony on facts or circumstances that are very material to the merits of the case, but who cannot be examined either because it is not deemed expedient to summon them, or because they refuse to appear though summoned, mention of such is to be made in the minutes of the proceedings, and care must be taken to supply for their absence by the depositions of other witnesses who, by hearsay or in some other manner, have come by the knowledge sought.

XXI. When all has been collected that is necessary to establish the fact of the crime and the culpability of the accused, the latter is cited for examination.

Itaque antequam testificentur cum de veritate tum de secreto jurent. Eo magis de officio fideliter adimplendo et de secreto, pro rei de qua agitur exigentia, servando omnes juramento obstricti sint oportet, qui in instructione processus ex suo munere partem aliquam habeant.

XIX. Testium absentium aut in aliena dioecesi morantium exposcitur examen in subsidium ab ecclesiastica loci auctoritate, eidem transmittendo prospectum facti; et auctoritas requisita petitioni respondet, servando praesentis instructionis normas.

XX. Quoties indicentur testes ob facta aut adiuncta essentialiter utilia merito causae, qui examini subiici nequeant, eo quod censeatur haud convenire ut vocentur, aut quia vocati abnuant, mentio eorumdem fit in actibus, et curatur supplere eorum defectui per depositiones aliorum testium, qui de relato aut alia ratione noverint id quod exquiritur.

XXI. Quum collectum fuerit quidquid opus sit ad factum et accusati responsabilitatem constituendam, vocatur iste ad examen.

XIX. Testés qui in locis longe dissitis vel in aliena dioecesi degunt, mediante auctoritate ecclesiastica loci in quo manent examinentur, in quem finem specimen factorum transmittetur: quae quidem auctoritas in responsione normas in hac Instructione contentas observabit.

XX. Si indicentur testes qui de factis vel circumstantiis ad meritum causae substantiale spectantibus interrogandi essent, nec examinari possint, vel quia non *licet aut* decet eos citare in judicium, vel quia rogati adesse recusent, necesse est id in actis commemorare, eorumque deficientia suppletur testimoniis aliorum qui vel de relato vel aliter rem de qua quaeritur, noverint.

XXI. Ubi id omne quod ad veritatem factorum constituendam et culpam accusati probandam pertinet absolutum fuerit, imputatus *intimatione scripta* ad examen vocatur.

XXII. Nella intimazione, se la prudenza non lo vieti, gli si espongono per esteso le accuse portate a suo carico, onde possa prepararsi a rispondervi.

XXIII. Quando poi per la qualità delle accuse, o per altre circostanze non sia prudenziale di esprimerle nella intimazione, in questa gli si accenna soltanto che è chiamato all'esame per discolparsi in una causa che lo riguarda come inquisito.

XXIV. Rifiutando egli di presentarsi, si rinnova la intimazione, nella quale gli si prefigge un congruo termine perentorio a comparire, e gli si notifica, che rendendosi ancora disubbidiente, si avrà come contumace: e per tale sará effettivamente tenuto, posto che senza dar prova di legittimo impedimento, trasgredisse pur questa intimazione.

XXV. Presentandosi, si sente in esame: e se fa induzioni valutabili, devono queste, per quanto si può, essere esaurite.

XXVI. Si procede indi alla contestazione del fatto delittuoso, e delle risultanze che

XXII. In this citation, unless prudence counsel otherwise, the accusations made against him are stated in detail, that the accused may have an opportunity to prepare his reply to the charges.

XXIII. When, on account of their nature or other reasons, it is not prudent to detail the charges in the citation, the accused is simply called on to exculpate himself in a case that concerns him as defendant.

XXIV. If he refuse to appear the citation is repeated, but this time peremptorily fixing a suitable term within which he must present himself. He must be notified that if disobedient to this summons he shall be held as contumacious, and shall in fact be so treated, if without proof of lawful impediment he disregard this citation.

XXV. On presenting himself he is examined, and if he adduce arguments of any weight they are to be sifted as carefully as possible.

XXVI. Next they proceed to contest the delict and the conclusions already arrived

XXII. In indictione, nisi prudentia id vetet, exponuntur ei per extensum accusationes adversus eum collatae, ut parari valeat ad respondendum.

XXIII. Quando autem ob accusationum qualitates, aut ob alia adiuncta prudens non sit in actu intimationis eas patefacere, in hac solum innuitur eundem ad examen vocari ut sese excuset in causa, quae ipsum respicit uti accusatum.

XXIV. Si iudicio stitere abnuat, iteratur indictio, in qua eidem praefigitur congruum peremptorium terminum, eique significatur quod si adhuc obedire renuat, habebitur ceu contumax; et pro tali in facto aestimabitur, quatenus absque probato legitimo impedimento, istam quoque posthaberet intimationem.

XXV. Si compareat, auditur in examine; et quatenus inductiones faciat alicuius momenti, debent istae, quantum fieri potest, exhauriri.

XXVI. Proceditur inde ad contestationem facti criminosi, et conclusionem habi-

XXII. In intimatione, nisi prudentia obstet, accusationes contra reum perlatae per extensum referuntur, ut ad responsionem se praeparare possit.

XXIII. Quod si ob accusationum qualitatem vel alia de causa haud expediat ut in intimatione exprimantur, in hac satis erit innuere ipsum ad examen vocari ut in causa, de qua contra eum fit inquisitio, sese defendat.

XXIV. Si ad examen accedere recuset, iterum fit intimatio, atque in ea congruum tempus peremptorium praefinitur, intra quod reus coram tribunali se sistere debeat, eique significatur, si non pareat, contumacem esse judicandum: quam intimationem si haud probato legitimo impedimento transgrediatur, ut contumax de facto habebitur.

XXV. Verum si ad examen accedat, audiatur: et ubi inductiones alicuius valoris exhibeat, eae quantum fieri potest accurate discutiantur.

XXVI. Dein accedendum est ad contestationem delicti et argumentorum, quae pro-

se ne sono avute, per credere l'inquisito colpevole, ed incorso nelle relative penalità canoniche.

xxvii. Avendo in questo modo l'inquisito piena contezza di ciò che esiste in atti a suo carico, oltre al rispondere, può anche valersi del diritto che ha di difendersi da se stesso.

xxviii. Può altresi, se lo richiede, ottenere la prefissione di un termine ad esibire la difesa con memoria scritta, specialmente quando pel disposto dell'Art. XXIII. non avesse potuto prepararsi alle risposte in sua discolpa.

xxix. Ultimato il processo, il compilatore degli atti, forma il ristretto delle essenziali risultanze del medesimo.

xxx. Nel giorno che si propone la Causa, l'inquisito è in facoltà di farsi rappresentare e difendere da altro Sacerdote o da laico Patrocinatore, preventivamente approvati dall'Ordinario.

xxxi. Ove il prevenuto si ricusi di deputare il Difen-

at that the accused is guilty and has incurred the corresponding canonical penalties.

xxvii. The accused being thus fully informed of all that lies against him in the acts may, besides making a simple answer, further claim the right to make his defence in person.

xxviii. He may also, at his request, obtain the fixing of a date for handing in his defence in a written memorial, especially if owing to the provisions of art. xxiii. he had had no opportunity to prepare a reply in his defence.

xxix. When the informative process is concluded, the auditor of the trial will make an abstract of the substantial results obtained.

xxx. On the day when the case is called up by the judge, the accused is at liberty to be represented and defended by another clergyman or by a lay-counsel, previously accepted by the bishop.

xxxi. If the accused refuse to name counsel, the

tarum, ad retinendum accusatum criminosum lapsumque in relativis poenis canonicis.

XXVII. Quum accusatus, tali modo, habeat plenam cognitionem eius quod in actis extat contra se, ultra quod respondere possit, iure se defendendi a semetipso etiam uti valet.

XXVIII. Potest quoque, si id expetat, obtinere praefixionem termini ad exhibendam defensionem cum memoria in scriptis, praecipue quando ob dispositionem art. XXIII nequiverit paratus esse ad responsa pro sua excusatione.

XXIX. Expleto processu, actorum instructor, restrictum conficit essentialium conclusionum eiusdem.

XXX. In die qua causa proponitur, est in facultate accusati faciendi se repraesentare et defendere ab alio sacerdote aut laico patrocinatore, antea approbatis ab Ordinario.

XXXI. Quatenus praeventus constituere defensorem

stant, ut inquisitus et culpabilis habeatur et in poenas canonicas incurrisse censeatur.

XXVII. Inquisitus, ubi ex his noverit quae in actis contra ipsum relata sunt, ad ea respondere potest, ac si velit utetur jure defensiònis a seipso *in scriptis* peragendae.

XXVIII. Potest etiam, si postulet, obtinere ut terminus ad defensionem scripto exhibendam praefigatur: maxime si ob ea quae art. XXIII indicata sunt, responsionem ad accusationes contra se latas parare non potuerit.

XXIX. Absoluto processu redactor actorum summarium praecipuorum argumentorum, quae ex ipso elucent, conficiat.

XXX. Qua die causa proponetur, inquisito fiet facultas defensionem suam per alium sacerdotem suo nomine *in scriptis* exhibendi. *Quod si idoneum non reperiat*, laicum catholicum adhibere potest. Quisque autem ex iis ab Ordinario approbandus est.

XXXI. Si vero reus defensorem deputare recuset, Or-

sore, l'Ordinario provvede con destinargliene uno d'officio.

XXXII. Il Difensore con la dovuta riservatezza prende cognizione del processo e del ristretto in Cancelleria, onde sia in grado di far la difesa, la quale può essere esibita precedentemente alla proposizione della Causa in fogli manoscritti. È pur esso soggetto all'obbligo giurato del segreto, qualora a giudizio dell Ordinario la natura della Causa lo esiga

XXXIII. Si trasmette quindi al Procuratore fiscale il processo, ed il ristretto perchè adempia alle sue incombenze di officio: e poi si passa l'uno e l'altro all'Ordinario, il quale presa integra cognizione della Causa, destina il giorno, in cui debba discutersi e decidersi, facendone dare partecipazione all'accusato.

XXXIV. Nel giorno stabilito si propone la Causa innanzi al Vicario generale con l'intervento del Procuratore fiscale, del Difensore, e del Cancelliere.

XXXV. Dopo il parere fiscale, e le deduzioni difen-

bishop will provide for the official appointment of one.

XXXII. The counsel, subject to due restriction, takes notice of the acts and the abstract thereof at the chancellor's office, in order to be in a position to make the defence; and he is at liberty to hand in his defence in writing before the trial comes off. Counsel also may be sworn to secrecy, if in the judgment of the Ordinary the nature of the case require it.

XXXIII. The acts and the abstract are now handed over to the official prosecutor that he may fulfil his official duties; both are then taken to the Ordinary, who, after acquiring a full knowledge of the case, will appoint a day for the hearing thereof and decision, and see that the accused be notified of the same.

XXXIV. On the day appointed the case is brought up before the vicar-general in presence of the fiscal procurator, counsel for the defence, and the chancellor.

XXXV. After the arguments of the official prose-

renuat, Ordinarius consulit constituendo aliquem ex officio.

XXXII. Defensor caute notitiam haurit processus et restricti in cancellaria, ut paratus sit ad defensionem peragendam quae ante propositionem causae exhiberi potest in scriptis. Ipse quoque subiicitur oneri secreti iurati, quatenus Ordinario videatur indolem causae id expostulare.

XXXIII. Transmittitur dein procuratori fiscali processus et restrictus, ut munere suo ex officio fungatur; uterque Ordinario traditur qui plena causae cognitione adepta, diem constituit in qua disceptanda et resolvenda sit, curans ut accusatus certior de hoc fiat.

XXXIV. Die constituta proponitur causa coram vicario generali, interessentibus procuratore fiscali, defensore et cancellario.

XXXV. Post votum procuratoris fisci et deductiones defensionis profertur sen-

dinarius illum ex officio designabit.

XXXII. Defensor debitis sub cautelis in cancellaria curiae processum ejusque summarium inspiciet, ut reum tueatur; ac defensionem ante causae ipsius propositionem scripto *exhibebit.* Ipse quoque ad juramentum de secreto servando tenetur, quando judex indolem causae id postulare censuerit.

XXXIII Processus ejusque summarium ad procuratorem fiscalem mittitur, ut officio suo fungi possit. *Postquam procurator fiscalis suas conclusiones ediderit, eaedem defensori rei communicandae sunt ut ad easdem si placuerit in scriptis respondeat;* tum omnia ad ordinarium remittuntur qui, ubi in plenam causae cognitionem devenerit, diem constituet in qua sententia dicenda sit.

XXXIV. Praestituta die, ab *Episcopo vel* vicario generali praesente procuratore fiscali et defensore sententia pronunciatur, ejusque pars dispositiva cancellario dictatur, expressa mentione facta, si damnationi sit

sive si pronunzia la sentenza, dettandosi al Cancelliere la dispositiva, con espressa menzione, in caso di condanna, della sanzione canonica applicata contra l'imputato.

XXXVI. La sentenza s'intima al prevenuto, il quale può interporne appello all' Autorità ecclesiastica superiore.

XXXVII. Per l'appello si osservano le norme stabilite dalla Costituzione *Ad militantis* della sa. me. di Benedetto XIV 30 marzo 1742, e le altre emanate da questa s. Congregazione col Decreto 18 decembre 1835 e colla Circolare 1 agosto 1851.

XXXVIII. La comparsa per l'appello deve farsi nel termine di giorni dieci dalla notifica della sentenza; scorso inutilmente questo termine, la sentenza stessa è in istato di essere eseguita.

XXXIX. Interposto l' appello entro i dieci giorni, la Curia senza ritardo rimette all'Autorità ecclesiastica superiore, innanzi cui si è ap-

cutor and those for the defence have been heard, sentence is pronounced and the decision proper dictated to the chancellor; but, in case of condemnation, explicit mention must be made of the canonical sanction applied to the accused.

XXXVI. The sentence is communicated to the accused, who may lodge an appeal to higher ecclesiastical authority.

XXXVII. In case of appeal the methods laid down by Benedict XIV. of p. m. in the Const. *Ad militantis*, issued March 30, 1742,[1] and by this S. Congregation in a decree issued Dec. 18, 1835,[2] and in the circular letter of Aug. 1, 1851,[3] are to be followed.

XXXVIII. Notice of the appeal must be given within ten days after receiving notice of the sentence; this time having passed without any action, the sentence awaits execution.

XXXIX. If the appeal be made within ten days, the diocesan *curia* will forward without delay to the higher court, to which appeal has

[1] See p. 241. [2] See p. 234. [3] See p. 237.

tentia, dictando dispositivam cancellario, cum explicita mentione, in casu damnationis, canonicae sanctionis, accusato applicatae.

locus, sanctionis canonicae quae contra imputatum applicatur.

xxxvi. Sententia indicitur praevento, qui appellationem interponere potest ad auctoritatem ecclesiasticam superiorem.

xxxvii. Pro appellatione servantur normae statutae a constitutione *Ad militantis* s. m. Bened. XIV. 30 Martii 1742, aliaeque emanatae ab hac s. Congregatione decreto 18 Decembris 1835 et littera circulari diei 1 Augusti 1851.

xxxv. Sententia reo intimetur, qui potest ad auctoritatem superioris instantiae appellationem interponere.

xxxvi. In appellatione observentur normae expressae in constit. s. m. Benedicti XIV. *Ad militantis* diei 30 Martii 1742, ac ceterae indictae a S. C. Ep. et RR. decreto diei 18 Decembris 1835, et epistola circulari diei 1 Aug. 1851.

xxxviii. Comparitio pro appellatione facienda est infra terminum decem dierum a notificatione sententiae; quo termino inutiliter elapso, sententia ipsa in executionis statu reperitur.

xxxvii. Intra terminum decem dierum a notificatione sententiae interpositio appellationis fieri debet, quo elapso tempore sententiae executio locum habet.

xxxix. Interposita appellatione infra decem dies, curia absque mora remittit ad auctoritatem ecclesiasticam superiorem, apud quam

xxxviii. Appellatione interposita, continuo curia ad auctoritatem ecclesiasticam superioris instantiae omnia acta causae in suis auto-

pellato, tutti gli atti originali della Causa, cioè il processo, il ristretto, le difese, e la sentenza.

XL. L'autoritá ecclesiastica superiore presa cognizione dell' atto di appello, fa intimare all' appellante, che nel termine di giorni venti deputi il Difensore, che deve essere approvato dalla medesima superiore Autorità.

XLI. Trascorso l'enunciato termine perentorio senza effetto, si ritiene che l'appellante abbia rinunziato al benefizio dell'appello, e questo viene in conseguenza dall'Autorità superiore dichiarato perento.

XLII. Producendosi l'appello dalla sentenza di una Curia vescovile alla Metropolitana, l'Arcivescovo nella cognizione e decisione della Causa si attiene al metodo di procedura tracciato in questa intruzione.

XLIII. Se avvenga che un Chierico, in onta al privilegio del foro, sia per reati communi sottoposto a procedura e giudicato dal Potere laico, l'Ordinario in tal caso prende sommaria informazione del fatto delittuoso, ed esamina se a

been made, all the original acts in the case, namely, the minutes, the abstract, the defence, and the sentence.

XL. The higher ecclesiastical authority having taken cognizance of the appeal shall notify the appellant that within twenty days he is to appoint his counsel, who must be accepted by the same higher authority.

XLI. If this peremptory limit be allowed to pass without action, the appellant is presumed to have renounced the benefit of appeal, and the appeal is accordingly by the higher authority declared set aside.

XLII. When an appeal is taken from an episcopal to the metropolitan court, the archbishop in taking cognizance of and deciding the case will follow the methods set forth in this Instruction.

XLIII. If, notwithstanding the benefit of the clergy, a cleric be subjected on account of common delicts to a criminal suit before a civil court, the Ordinary in this case will take summary cognizance of the delict and consider whether, according

appellatio facta est, omnes actus causae originales, id est processum, restrictum, defensiones et sententiam.

XL. Auctoritas ecclesiastica superior, capta cognitione actus appellationis, intimare facit appellanti, ut infra terminum viginti dierum defensorem constituat, qui approbari debet ab eadem superiori auctoritate.

XLI. Decurso dicto termino peremptorio absque effectu, censetur appellantem nuntium misisse appellationis beneficio et haec consequenter perempta declaratur a superiori auctoritate.

XLII. Quum appellatio producitur a sententia alicuius curiae episcopalis ad Metropolitanam, Archiepiscopus pro cognitione et decisione causae sequitur normam procedendi in hac instructione traditam.

XLIII. Si contingat quod clericus, non obstante fori privilegio, ob crimina communia subiiciatur processui et iudicio laicae potestatis, Ordinarius, hoc in casu, summariam sumit criminosi facti cognitionem, atque perpendit an ipsum, ad tra-

graphis, id est processum, ejus summarium, defensionem ac sententiam mittit.

XXXIX. Haec porro superioris instantiae auctoritas appellatione cognita appellanti injungit, ut intra *triginta* dies defensorem deputet, qui ab ipsa approbandus est.

XL. Eo termino peremptorio frustra elapso, censetur reus beneficio appellationis renuntiasse, quam propterea judex gradus superioris peremptam declarat.

XLI. In appellatione a sententia curiae episcopalis ad metropolitanam Archiepiscopus in causa cognoscenda ac definienda eadem procedendi methodo utetur, quae in hac instructione indicatur.

XLII. Si clericus ob communes reatus a civili potestate privilegio fori non obstante processui ac judicio subjiciatur, Ordinarius summariam informationem criminis assumit, ac inquirit num ad normam sacrorum canonum infamiae, irregu-

senso de' sacri canoni, esso può dar luogo ad infamia, ad irregolarità o ad altra ecclesiastica sanzione.

§ 1. Finchè pende il giudizio o l'imputato sia detenuto, è cosa prudente, che l'Ordinario si limiti a misure provvisionali.

§ 2. Terminato però il giudizio, e reso libero l'accusato, la Curia, giusta i risultati delle informazioni come sopra assunte, procede analogamente a quanto è disposto nella presente istruzione.

XLIV. Nei casi dubbi, e nelle varie difficoltà pratiche in cui possano incontrarsi, gli Ordinari prendono consiglio da questa s. Congregazione per evitare contese e nullita.

to the holy canons, infamy, irregularity, or other ecclesiastical penalty be the result.

§ 1. Pending the suit, and while the accused is held, it will be prudent for the Ordinary to confine himself to provisional measures.

§ 2. After the trial and when accused has been released, the *curia*, according to the results of informations taken as above, will proceed according to the norms of this present Instruction.

XLIV. In dubious cases and in the various practical difficulties that may arise, Ordinaries will ask advice of this Sacred Congregation to avoid litigation and nullity.

Ex aud. SSmi dici 11 *Junii* 1880.

SSmus Dnus Noster LEO div. prov. PP. XIII., audita relatione praesentis Instructionis ab infrascripto Sac. Congreg. Episcoporum et Regularium Secretario, eam in omnibus approbare et confirmare dignatus est.

Romae die et anno quibus supra.

I. CARD. FERRIERI, *Praef.*

I. B. AGNOZZI, *Secretarius.*

dita per sacros canones, locum faciat infamiae, irregularitati aut alii ecclesiasticae sanctioni.

§ 1. Donec iudicium pendeat, aut accusatus detentus sit, prudens est, quod Ordinarius sese limitet ad media provisoria.

§ 2. Expleto tamen iudicio, et libero reddito accusato, curia iuxta exitum informationum ceu superius assumptarum, procedit ad tramites dispositionum praesentis instructionis.

XLIV. In casibus dubiis et in variis practicis difficultatibus, quae contingere possint, Ordinarii consulant hanc s. Congregationem, ad vitandas contentiones et nullitates.

laritati, vel alii ecclesiasticae sanctioni locus esse possit.

1°. Pendente judicio vel imputato in carcere detento prudens consilium erit, ut Ordinarius ordinationes mere provisorias adhibeat.

2°. Judicio absoluto, si liber accusatus remittatur, curia episcopalis juxta informationes ut supra assumptas ea ratione procedet, quae in hac instructione constituitur.

XLIII. In casibus dubiis diversisque in praxi difficultatibus Ordinarii Sacram hanc Congregationem consulant, ut contentiones ac nullitatem actorum devitent.

XLIV. *Haud ita facile curiae episcopales ad damna vel expensas resarciendas damnari poterunt; quoties enim ex processu informativo indicia sufficientia ad agendum contra inquisitum appareant, judex appellationis a talibus damnationibus abstineat, cum ea indicia sufficiant ut in judice, qui antea processit, ea vera et propria calumnia excludatur, quae ad hujusmodi damnationem requiritur.*

XLV. *Concilii Plenarii Baltimorensis II. decreta n.* 125 *quoad naturam missionum, et nn.* 77, 108 *quoad juridicos effectus remotionis missionariorum ab officio, nullatenus innovata seu infirmata intelliguntur, salvis iis quae recentius de parochis seu rectoribus inamovibilibus constituta sunt.*

Instructio S. Congregationis de Prop. Fide de Commissione Investigationis.*

Quamvis Concilium Plenarium Baltimorense II. ab Apostolica Sede recognitum, certam quamdam iudicii formam, iam antea a concilio provinciali S. Ludovici sancitam, in criminalibus clericorum causis ab ecclesiasticis curiis dioecesium Foederatorum Septentrionalis Americae Statuum pertractandis servandam esse decreverit, experientia tamen compertum est, statutum iudicii ordinem haud undequaque parem esse ad querelas eorum praecavendas, quos poena aliqua mulctari contigerit. Saepe enim postremis hisce temporibus accidit, ut presbyteri iudiciis ea ratione initis latisque sententiis damnati, remoti praesertim ab officio rectoris missionarii, huc illuc de suis Praelatis conquesti fuerint et frequenter etiam ad Apostolicam Sedem recursus detulerint. Dolendum autem est, non raro evenire, ut in transmissis actis plura, eaque necessaria desiderentur, atque perpensis omnibus gravia saepe dubia oriantur circa fidem documentis hisce in causis allatis habendam vel denegandam.

Quae omnia S. Congregatio fidei propagandae praeposita serio perpendens, aliquod remedium hisce incommodis parandum, ac ita iustitiae consulendum esse censuit, ut neque insontes clerici per iniuriam poena afficiantur, neque alicuius criminis rei ob minus rectam iudiciorum formam a promerita poena immunes evadant. Quod quidem facili pacto obtineret, si omnes praescriptiones a sacris canonibus sapienter editas pro ecclesiasticis iudiciis, praesertim criminalibus, ineundis et absolvendis servandas omnino esse praeciperet. Verum animo reputans, in praedictis Foede-

* The Latin notes are from the answer of the S. C., given in full in the *Appendix C. Pl. B. III.*, p. 296.

ratorum Ordinum regionibus id facile servari non posse, ea ratione providendum esse duxit, ut saltem illae de admisso crimine accurate peragantur investigationes, quae omnino necessariae existimantur, antequam ad poenam irrogandam deveniatur.[1]

Itaque SSmo. Domino Nostro Divina Providentia PP. Leone XIII. approbante, in generalibus comitiis habitis die 25 Iunii 1878, S. Congr. decrevit ac districte mandavit, ut singuli memoratae regionis sacrorum Antistites in dioecesana synodo quamprimum convocanda quinque, aut ubi ob peculiaria rerum adiuncta tot haberi nequeant, tres saltem presbyteros ex probatissimis, et quantum fieri poterit in iure canonico peritis seligant, quibus consilium quoddam iudiciale, seu, ut appellant, Commissio Investigationis constituatur, eidemque unum ex electis praeficiant. Quod si ob aliquam gravem causam synodus dioecesana statim haberi nequeat, quinque vel tres prouti supra per Episcopum interim ecclesiastici viri ad munus de quo agitur deputentur.

Commissionis ita constitutae princeps erit officium criminales atque disciplinares presbyterorum aliorumque clericorum causas, iuxta normam mox proponendam, ad examen revocare, rite cognoscere ac ita Episcopo in ipsis definiendis auxilium praebere. Satagant propterea oportet

[1] i. Instructio diei 20 Iulii 1878 lata est de casibus, in quibus ecclesiastica poena seu censura sit infligenda, aut gravi disciplinari coercitioni sit locus. Hinc C. Pl. C. Balt. decreta n. 125 quoad naturam missionum, nn. 77, 108, quoad iuridicos effectus remotionis missionariorum ab officio nullatenus innovata seu infirmata fuerunt.

Episcopi vero curent, ne sacerdotes sine gravi et rationabili causa de una ad aliam missionem invitos transferant. Quod si de alicuius rectoris definitiva remotione a munere in poenam delicti infligenda agatur, id Episcopi executioni non mandent, nisi audito prius Consilio.

iv. Per Instructionem sublata non est Episcopis extraordinaria facultas procedendi ad suspensionem ex informata conscientia, quatenus gravissimas et canonicas causas concurrere in Domino iudicaverint, aut gravi et urgente necessitate pro salute animarum, etiam non audito consilio, remedio aliquo providendum esse censuerint.

ad hoc munus electi, ut accuratae fiant investigationes, ea proferantur testimonia atque a praesumpto reo omnia exquirantur, quae ad veritatem eruendam necessaria censentur ac ad iustam sententiam tuto prudenterque ferendam certa vel satis firma argumenta suppeditent.

Quod si de alicuius rectoris missionis remotione agatur, nequeat ipse a credito sibi munere deiici, nisi tribus saltem praedictae Commissionis membris per Episcopum ad causam cognoscendam adhibitis, eorumque consilio audito.

Electi consiliarii in suscepto munere permanebunt ad proximam usque dioecesanae synodi celebrationem, in qua vel ipsi confirmentur in officio vel alii designentur. Quod si interim morte, aut renuntiatione vel alia causa praescriptus consiliariorum numerus minuatur, Episcopus extra synodum alios in deficientium locum, prout superius statutum est, sufficiat.

In causis cognoscendis, iis praesertim in quibus de rectore missionario definitive a suo officio amovendo agatur, iudicialis Commissio hanc sequetur agendi rationem.

1. Ad Commissionem investigationis non recurratur, nisi prius clare et praecise exposita ab Episcopo causa ad deiectionem finalem movente, ipse rector missionarius malit rem ad Consilium deferri, quam se a munere et officio sponte dimittere.

2. Re ad Consilium delata, Episcopus vicario suo generali vel alii sacerdoti ad hoc ab ipso deputato comittat, ut relationem causae in scriptis conficiat, cum expositione investigationis eo usque peractae, et circumstantiarum, quae causam vel eiusdem demonstrationem specialiter afficiant.

3. Locum, diem, et horam opportunam ad conveniendum indicet, idque per litteras ad singulos consiliarios.

4. Per litteras etiam rectorem missionarium, de quo agitur, ad locum et diem constitutum ad Consilium habendum advocet, exponens, nisi prudentia vetat, uti in casu criminis occulti, causam ad deiectionem moventem, per extensum monensque ipsum rectorem, ut responsum suis rationibus suffultum ad ea praeparet in scriptis, quae in

causae expositione vel iam antea oretenus, vel tunc in scriptis relata fuerint.

5. Convenientibus consiliariis tempore et loco praefinitis, praecipiat Episcopus silentium servandum de iis, quae in Consilio audiantur; moneat investigationem non esse processum iudicialem, sed eo fine habitam, et eo modo faciendam, ut ad cognitionem veritatis diligentiori qua poterit ratione perveniatur, adeo ut unusquisque consiliarius, perpensis omnibus, opinionem de veritate factorum, quibus causa innititur, efformare quam accurate possit. Moneat etiam ne quid in investigatione fiat, quod aut ipsos, aut alios periculo damni vel gravaminis exponat, praesertim ne locus detur actioni libelli famosi, vel alii cuicumque processui coram tribunali civili.

6. Relatio causae legatur coram Consilio ab Episcopi officiali, qui etiam ad interpellationes respondebit a praeside vel ab aliis consiliariis per praesidem faciendas ad uberiorem rei notitiam assequendam.

7. Deinde in Consilium introducatur rector missionarius, qui responsum a se confectum leget, et ad interpellationes similiter respondebit, facta ipsi plena facultate ea omnia in medium afferendi, intra tempus tamen a Consilio determinandum, quae ad propriam defensionem conferre possunt.[1]

8. Si contingat, rectorem missionarium, de cuius causa agitur, nolle ad Consilium accedere, iterum datis litteris vocetur, eique congruum temporis spatium ad comparendum praefiniatur, et si ad constitutum diem non comparuerit, dummodo legitime praepeditus non fuerit, uti contumax habeatur.

9. Quibus omnibus rite expletis, consiliarii simul consilia conferant, et si maior pars consiliariorum satis constare de factis arbitretur, sententiam suam unusquisque consiliarius in scriptis exponat rationibus quibus nititur expressis;

[1] iv. Liberum cuique rectori est alium sacerdotem ab Episcopo approbandum secum habere coram Consilio sive ad simplicem adsistentiam sive ad suas animadversiones aut defensionem exhibendam.

conferantur sententiae; acta in Consilio ab Episcopi officiali redigantur, a praeside nomine Consilii subscribantur, et simul cum sententiis singulorum in extenso ad Episcopum deferantur.

10. Quod si ulterior investigatio necessaria vel congrua videatur, eo ipso die, vel alio ad conveniendum a Consilio constituto, testes vocentur quos opportunos Consilium iudicaverit, audito etiam rectore missionario de iis quos ipse advocandos esse voluerit.

11. Singuli testes *pro causa* seorsim et accurate examinentur a praeside et ab aliis per praesidem, absente primum rectore missionario. Non requiratur iuramentum, sed si testes ipsi non renuant, et se paratos esse declarent ad ea quae detulerint iuramento, data occasione, confirmanda, fiat adnotatio huiusmodi dispositionis seu declarationis in actis.

12. Consentientibus testibus, et dirigente prudentia Consilii, repetatur testimonium coram rectore missionario, qui et ipse testes si voluerit interroget per praesidem.

13. Eadem ratione qua testes *pro causa*, examinentur testes *contra causam*.

14. Collatis tunc consiliis fiat ut supra n. 9.

15. Quod si testes nolint aut nequeant Consilio assistere, vel eorum testimonium nondum satis luculentum negotium reddat, duo saltem ex Consilio deputentur, qui testes adeuntes, loca invisentes, vel alio quocumque modo poterunt, lumen ad dubia solvenda requirentes, relationem suae investigationis ad Consilium deferant, ut ita nulla via intentata relinquatur ad verum moraliter certo cognoscendum antequam ad sententiae prolationem deveniatur.

16. Omnia acta occasione iudicii in medium allata accurate in curia episcopali custodiantur, ut in casu appellationis commode exhiberi valeant.

17. Si vero contingat, ut a sententia in curia episcopali prolata ad Archiepiscopalem provocetur, Metropolitanus eadem methodo in causae cognitione et decisione procedat.

Ex aedibus praefatae S. Congregationis die 20 Iulii anni 1878.

Ioannes Card. Simeoni, *Praefectus.*
Ioannes Baptista Agnozzi, *Secretarius.*

Instructio S. Congregationis de Prop. Fide supra Suspensionibus ex Informata Conscientia.

Omni tempore sollicita fuit Ecclesia ut non solum ascensus ad sacros Ordines interdiceretur indignis, verum etiam ab eorumdem exercitio criminosi suspensi manerent.

Cum autem occultorum quoque criminum, quaeque prodere non expediret, facilis et prompta, nempe a iudiciariis formis libera, coercitio aliquando necessaria sit ad sacri ministerii dignitatem, et fidelium utilitatem tuendam; hinc sapientissimo consilio Tridentini Patres Sess. xxiv. cap. 1. de Reform. decreverunt: "*Ei cui ascensus ad sacros ordines a suo Praelato ex quacumque causa, etiam ob occultum crimen, quomodolibet, etiam extraiudicialiter fuerit interdictus, aut qui a suis ordinibus seu gradibus vel dignitatibus ecclesiasticis fuerit suspensus, nulla contra ipsius Praelati voluntatem concessa licentia de se promoveri faciendo, aut ad priores ordines, gradus et dignitates sive honores restitutio suffragetur.*"

Ex hoc provido decreto, in eo quod refertur ad Clericorum crimina, quae extraiudicialem suspensionem ab ecclesiasticis officiis merentur, iamdudum in usu fuit suspensionis poena ex causis Praelato notis; quae nempe audit suspensio *ex informata conscientia.* Ad hoc itaque ut in eadem infligenda, cum maiori qua potest cautela et securitate Ordinarii catholicarum missionum procedant, S. Congregatio de Propaganda Fide praesentem instructionem edendam censuit, cui iidem Ordinarii in adhibendo hoc extraordinario remedio sese conformare curabunt.

1. Suspensio ex informata conscientia, non secus ac illa, quae per iudicialem sententiam infligitur, personam ecclesiasticam a suis ordinibus, seu gradibus, vel dignitatibus ecclesiasticis exercendis interdicit.

2. In hoc praecipue ipsa differt a iudiciali suspensione, quod adhibetur tamquam extraordinarium remedium in poenam admissi criminis; ideoque ad eiusdem impositionem non requiruntur nec formae iudiciales, nec canonicae admonitiones. Satis erit proinde, si Praelatus hanc poenam infligens, simplici utatur praecepto, quo declaret se suspensionem ab exercitio sacrorum officiorum vel ecclesiasticorum munium indicere.

3. Huiusmodi praeceptum semper in scriptis intimandum est, die et mense designato; ideoque autem fieri debet vel ab ipso Ordinario, vel ab alia persona de expresso ipsius mandato. In eadem tamen intimatione exprimendum est, quod eiusmodi punitio irrogatur in vim Tridentini decreti, Sess. xiv. c. 1. de reform., ex informata conscientia vel ex causis ipsi Ordinario notis.

4. Debent insuper exprimi partes exercitii ordinis vel officii, ad quas extenditur suspensio; quod si suspensus interdictus sit ab officio, cui alter in locum ipsius substituendus est, ut puta Oeconomus in cura animarum, tunc substitutus mercedem percipiet ex fructibus beneficii in ea portione, quae iuxta prudens Ordinarii arbitrium taxabitur. At si suspensus in hac taxatione se gravatum senserit, moderationem provocare poterit apud curiam Archiepiscopalem, aut etiam apud Sedem Apostolicam.

5. Exprimi item debet tempus durationis eiusdem poenae. Abstineant tamen Ordinarii ab ipsa infligenda in perpetuum. Quod si ob graviores causas Ordinarius censuerit eam imponere non ad tempus determinatum, sed ad suum beneplacitum, tunc ipsa habetur pro temporanea, ideoque cessabit cum iurisdictione Ordinarii suspensionem infligentis.

6. Suspensioni ex informata conscientia iustam ac legitimam causam praebet crimen, seu culpa a suspenso com-

missa. Haec autem debet esse occulta, et ita gravis, ut talem promereatur punitionem.

7. Ad hoc autem ut sit occulta requiritur, ut neque in iudicium, neque in rumores vulgi deducta sit, neque insuper eiusmodi numero et qualitati personarum cognita sit, unde delictum censeri debeat notorium.

8. Verum tenet etiam suspensio si ex pluribus delictis aliquod fuerit notum in vulgus; aut si crimen, quod ante suspensionem fuerat occultum, deinceps post ipsam fuerit ab aliis evulgatum.

9. Prudenti arbitrio Praelatorum relinquitur suspensionis causam, seu ipsam culpam delinquenti aut patefacere, aut reticere. Partes alioquin pastoralis sollicitudinis et charitatis eorumdem erunt, ut si istiusmodi poenam suspenso manifestare censuerint, ipsa ex paternis, quas interponent, monitionibus, nedum ad expiationem culpae, verum etiam ad emendationem delinquentis, et ad occasionem peccandi eliminandam inserviat.

10. Meminerint vero Praesules, quod si contra decretum, quo irrogata fuit suspensio, promoveatur recursus ad Apostolicam Sedem, tunc apud ipsam comprobari debet culpa, quae eidem praebuit occasionem. Consultum idcirco erit, ut antequam haec poena infligatur, probationes illius, quamtumvis extraiudicialiter et secreto colligantur; ita ut eo ipso, quod cum omni certiudine culpabilitatis in punitione inferenda proceditur, si deinceps causa examinanda est apud Apostolicam Sedem, probationes criminis in eas difficultates haud impingant, quae ut plurimum occurrunt in istiusmodi iudiciis.

11. A decreto suspensionis ex informata conscientia non datur appellatio ad tribunal superioris ordinis. Postquam idcirco clericus intimationem suspensionis habuerit, si nihilominus appellationem interponere, eiusque obtentu in altari ministrare, seu quovis modo suum ordinem solemniter exercere praesumat, statim incidit in irregularitatem.

12. Semper tamen patet aditus ad Apostolicam Sedem; et in casu quo clericus absque sufficienti ac rationabili

causa se hac poena multatum reputet, recurrere poterit ad Summum Pontificem. Interim tamen in vigore permanet decretum suspensionis usque dum ab ipso Pontifice, vel a S. Congregatione, quae de recursu iudicare debet, non fuerit rescissum aut etiam moderatum.

13. Ceterum ex quo istiusmodi poena est remedium omnino extraordinarium, quod praesertim ad expiationem criminum absque formis iudiciariis adhibetur, prae oculis habeant Praelati id quod sapientissime admonet Summus Pontifex s. m. Benedictus XIV. in suo tractatu *de Synodo Dioeces. l.* xii. *c.* 8. *n.* 6., quod nimirum reprehensibilis foret Episcopus, si in sua synodo declararet, se deinceps ex privata tantum scientia cum poena suspensionis a divinis animadversurum in clericos, quos graviter deliquisse compererit, quamvis eorum delictum non possit in foro externo concludenter probari, aut illud non expediat in aliorum notitiam deducere.

Romae ex Aedibus S. Congregationis de Prop. Fide die 20 Octobris 1884.

Decretum S. Congregationis Episcoporum et Regularium pro Causis Criminalibus.*

Non ita pridem a S. Congregatione negotiis et consultationibus Episcoporum et Regularium praeposita nonnullae regulae praescriptae fuerunt pro recta et expedita definitione causarum criminalium, quae a Curiis Episcoporum vel Ordinariorum ad eamdem S. Congregationem in gradu appellationis deferuntur.[1] Quas quidem praescriptiones,

[1] The procedure before the S. Congregation varies according as the issue is more or less important. Ordinary and unimportant cases are brought before the full meeting (*in pleno*) by the secretary, who states the two sides, *pro* and *con*, of the case. But when the matter is of great impor-

* Cfr. on p. 240 the *Dispositio* S. C. Epp., 26 Mch. 1886.

quoniam impedimenta sublata sunt, quae aliqua ex parte earum executioni interposita fuerant, visum est Eminentissimis Patribus in Conventu habito XV. Calend. Januar. MDCCCXXXV. uberius explicare, et cum assensu et approbatione S. D. N. Gregorii XVI. iterum promulgare, ut ab omnibus, ad quos pertinent, accuratissime serventur. Sunt autem quae sequuntur.

I. Reis a Curiis Episcopalibus criminali judicio damnatis spatium dierum decem conceditur, quo ad S. Congregationem Episcoporum et Regularium appellare possint.

II. Decem dies numerari incipient non a die, quo sententia lata est, sed a die, quo reo vel ejus defensori per cursorem denuntiata fuit.

III. Eo tempore elapso, quin reus vel ejus defensor appellaverit, latam a se sententiam Episcopus exequetur.

IV. Interposita intra decem dies appellatione Curia Episcopalis acta autographa totius Causae ad S. Congregationem continuo transmittat, nempe:

1. Processum ipsum in Curia confectum.

2. Ejus restrictum, seu compendiariam expositionem eorum, quae ex eodem processu emergunt.

3. Defensiones pro reo exhibitas.

4. Denique sententiam latam.

V. Ipsa Curia reo, ejusque defensori denuntiabit, appellationem coram eadem S. Congregatione prosequendam esse.

VI. Si nemo compareat aut si appellationis acta negli-

tance and requires special investigation, one of the eminent members of the S. C. is appointed referee (*judex relator*), who may associate with himself one or more of the approved consultors. Gregory XVI. on the 5 Sept. 1834 granted the following request of the S. C., viz.: *Eminentissimi Patres . . . rati sunt rem utilem fore, si exemplo aliquarum Congregationum majorum nonnulli consultores deligerentur, quorum esset super dubiis seu quaestionibus, de quibus rogarentur, sententiam suam exponere, firmis tamen manentibus antiquis institutionibus, ita ut de negotiis alicujus ponderis, deque consultationibus omnibus in pleno Auditorio semper deliberetur et statuatur designato aliquo ex Eminentissimis Patribus "qui videat et referat."*

genter vel malitiose protrahantur,[1] congruens tempus a S. Congregatione praefinietur, quo inutiliter elapso, causa deserta censeatur, et sententia Curiae Episcopalis executioni mandetur.

VII. Reo aut illi, qui ejus defensionem suscepit, tradendus est restrictus processus,[2] qui a Judice relatore conficitur.

VIII. Allegationes seu defensiones Eminentissimis Patribus distribuendas typis non committantur, nisi Judex relator imprimendi veniam dederit.

IX. Causa definietur statuta die ab Eminentissimis Patribus in pleno Auditorio congregatis.

X. Eidem Congregationi Procurator Generalis Fisci et Judex relator intererunt.

XI. Judex relator de toto statu causae ad Eminentissimos Patres referet, et Procurator Generalis Fisci stabit pro Curia Episcopali,[3] suasque conclusiones explanabit.

XII. Post haec Eminentissimi Patres judicium proferent,

[1] No definite term is mentioned when the appellant must appear. He is supposed to do it within reasonable time, otherwise a peremptory term will be given him by the S. C., which is rather lenient in this matter, and does sometimes grant several terms before it will throw the appeal out from the docket. *Droste* thinks that the term of twenty days mentioned in the Circular of 1851 apply only to cases brought from the episcopal courts of the Papal States for which the S. C. acts as first appellate court. However, the *Instr.* 1880, art. 36, and the *Decree* 1886, art. 6, seem to extend the provisions of 1851 to all episcopal courts to which the Instruction itself was sent; hence the same rules apply in this regard to all appeals whether they go to the metropolitan or to the S. C. Epp.

[2] Cfr. *Dispositio* 1886. arts. 1–4. Appellant is not furnished with the acts of the former trial, but only with an abstract of them, which the Eminent Referee must supply. This is quite sufficient, as appellant may have got the full acts copied by the chancellor, or by his counsel. These he may now send to his attorney at the tribunal of the S. C.

[3] The office of fiscal procurator-general was created by Benedict XIII., a. 1724. This officer was to act as attorney for the bishops in any cases brought by or against them to the S. C. Epp. The *Decree* 1886 in arts 3, 4 evidently introduces a similar procedure *in scriptis* before the S. C. as the *Cum Magn.* orders for the lower courts in arts. 32, 33.

sententiam Curiae Episcopalis aut confirmando, aut infirmando, aut etiam reformando.

XIII. Prolata sententia una cum omnibus Actis causae ad eamdem Curiam Episcopalem remittitur, ut eam exequatur.

XIV. Revisio, seu recognitio rei judicatae non conceditur, nisi ejus tribuendae potestas a Sanctitate Sua facta fuerit, et subsint gravissimae causae, super quibus cognitio, et judicium ad plenam Congregationem pertinet.

XV. Sciant denique Curiae Episcopales per novissimas leges, quae ad investiganda, et coercenda crimina pro Tribunalibus laicis promulgatae sunt, nihil detractum esse de formis, et regulis Canonicis, quas proinde sequi omnino debent non modo in conficiendo processu, ad quem spectant haec verba Edicti diei 5. Novembris 1831 = Nihil innovetur, quantum ad judicia ecclesiastica pertinet = verum etiam in poenis decernendis, quemadmodum in appendice ejusdem Edicti ita cautum est = Tribunalia jurisdictionis mixtae Clericos et Personas Ecclesiasticas iis poenis mulctabunt, quas secundum Canones et Constitutiones Apostolicas Tribunal Ecclesiasticum iisdem irrogaret =.

J. A. Card. Sala, Praefectus.

J. Patriarcha Constantinopolitanus, Secretarius.

EXTRACT FROM THE CIRCULAR OF THE S. CONGREGATION OF BISHOPS AND REGULARS, 1 Aug. 1851.*

. . . Finally, to hasten the disposal of cases laid on appeal before this S. Congregation, Your Lordship will instruct the members of your court that if within ten days after being informed of the sentence the defendant appeal to this

* The original Italian text of the full circular, with a Latin translation, is given by the *Acta S. S.*, XV. 547 ff.

S. C., and his appeal be admitted, and this being made known to the Ordinary with the usual order to prosecute the appeal within the peremptory term of twenty days,—those officers of the Curia must by formal message (*per atto cursorile*) inform appellant that if he intends to prosecute the appeal, he must within the peremptory term of twenty days appoint in this city an advocate or attorney accredited in the Roman court; and must moreover assure himself that the advocate chosen by him do actually accept the charge and, upon depositing the necessary sum, demand the acts from the judge-referee (*giudice relatore*). If appellant allow this term to lapse without avail, it will be taken for granted that he has waived the benefit of the appeal, which will consequently be declared off by this S. C. On the other hand, when the prosecutor or representative of the fiscal makes an appeal which is admitted by the S. C., and notice thereof given to the bishop, the appellee also, being now a party to the appeal, must be informed of the appeal taken by the former and admitted by the S. C.; he is at the same time notified that if he do not within the peremptory term of twenty days appoint his defender from among the advocates or attorneys of the Roman Curia, it will be presumed that he declines to take part in the proceedings, and on motion of the prosecutor or the attorney of the fiscal the proceedings will be carried through to judgment and no other appeal allowed. The same notice is given to the fiscal procurator or his attorney when he takes an appeal to the S. C., as is given to the condemned. The notifications, with the proper certificate of the court apparitor, must be laid before the Congregation.

In conclusion it should be remarked that the notification of the sentence and of the appeal being certified to by the court messenger must be made part of the records or acts, which, in virtue of art. 4 of the decree 18 Dec. 1835, are immediately to be supplied with a chronological index, and sent to this S. C., together with an abstract of the proceedings, with the defence, and an exact copy of the sentence,

the original of which remains with the episcopal court, to be kept in the criminal registry of the chancery. . . .

Fr. A. F. Cardinal Orioli, *Prefect.*
D. Patriarch of Constantinople, *Sec'y.*

Dispositio Provisoria

pro actis appellationis in causis criminalibus.

Sacra haec C. Epp. et RR. pro certo habens quod modi procedendi oeconomice, ordinati per Instructionem diei 11 Junii 1880 pro curiis ecclesiasticis in causis criminalibus quae clericos respiciunt, observari quoque debeant in actis appellationis quae apud ipsum Sacrum Consessum interponitur a sententiis ipsarum curiarum, opportunam censuit publicationem sequentis dispositionis:[1]

I. Defensor rei vel reorum eligendus inter advocatos a sacris Congregationibus approbatos, praevio deposito de more, prudenter notitiam sumit de restrictu et processu coram Judice relatore.

II. Quatenus vero ratione causae expedire censeat Emus. Dominus Card. Praefectus injungitur defensori servare secretum cum jurisjurandi vinculo.

III. Exhibitis defensionibus in scriptis, eaedem quatenus Emus. Dom. Card. Praefectus aeque opportunum censeat, communicari queunt procuratori fiscali curiae *a qua*, ut ille si necesse esse crediderit, in scriptis respondeat.

IV. De responso procuratoris fiscalis defensor sub debita cautela cognitionem sumere potest coram Judice relatore, ut replicare ultimo valeat pariter in scriptis.

V. Omnino autem excluditur defensoris et procuratoris fisci praesentia in comitiis Cardinalium quando causa resolvenda proponitur.

[1] See the Italian original in *Acta S. S.*, XIX. 296; *Nouvelle Revue Théol.*, XIX., No. 2, p. 132, with commentary.

VI. Excepta dispositione praecedentium articulorum, in sua plena vi quoad omnes partes ea omnia permanent quae S. C. constituit per decretum diei 18 Decembris 1835, per literas circulares diei 1 Augusti 1851, et per ordinationem diei 6 Junii 1847.[1]

Ex aud. SSmi. diei 26 *Martii* 1886.

SSmus. Dnus. Noster LEO div. prov. PP. XIII. audita relatione praesentis dispositionis ab infrascripto S. C. Epp. et RR. Secretario, eam in omnibus approbare et confirmare dignatus est.

Romae die et anno quibus supra.

J. Card. FERRIERI, *Praef.*

Fr. ANT. M. Archp. Palmyren., *Secret.*

EX RESPONSO S. C. DE PROP. FIDE.

13 Julii 1886.

. . . Declarat S. Congregatio nunquam sese fore admissuram recursum vel appellationem sacerdotum, qui ad judices laicos trahere ausi fuerint vel clericum sine venia Ordinarii, vel Episcopum sive venia Apostolicae Sedis, sive in causa ecclesiastica sive non, nisi prius recursum ad civile tribunal interpositum deseruerint. Episcopi vero juxta declarationem capitis *Cogentes* a Suprema Inquisitionis Congregatione, die 28 Januarii 1886, editam, possunt in praedictum clericum animadvertere poenis et censuris ferendae sententiae, maxime suspensione a divinis, servatis tamen servandis, et pro gravitate causae, si id expedire in Domino judicaverint. . . .

J. Card. SIMEONI, *Praef.*

D. Archp. Tyrens., *Secret.*

[1] See ap. *Acta S. S.*, XIX. 298; *Bizzarri*, p. 180.

De Appellationibus

et Inhibitionibus concedendis vel denegandis.

Benedictus Episcopus Servus Servorum Dei.
Ad perpetuam rei memoriam.

Ad militantis Ecclesiae regimen nullo meritorum Nostrorum suffragio, sed imperscrutabilis consilii altitudine evocati, inter graves curas quas assidue pro Nostro munere sustinemus, postrema illa non est in quam totis viribus Nobis incumbendum esse ducimus, ut graves nimium, diuturnae, nulloque unquam tempore intermissae Episcoporum aliorumque ordinariam jurisdictionem habentium querelae adversus majora tribunalia atque illa etiam Nostrae Romanae Curiae, propositae tandem compescantur.

§ 1. Intimo siquidem animi Nostri moerore, cum in minoribus adhuc essemus, jamdiu intelleximus plerosque locorum Ordinarios conqueri, sensim abusum irrepsisse, quod ad malitiosam petentium suggestionem a Patriarchis, Metropolitanis, Sanctae Sedis a latere Legatis, et diversis dictae Romanae Curiae judicibus inhibitiones sine delectu causae et rei de qua igitur examine, passim concedantur. Et quamvis in more positum sit dictas inhibitiones indebite expeditas pro causae meritis revocari et aboleri; remedium tamen inflicto vulneri non satis esse dicunt, cum interea oporteat Episcopos aliosque inferiores judices in ipso causarum et judiciorum cursu otiosos immorari, jus suum judicialiter asserere et vindicare, et ad continendos in officio populos gravia saepe incommoda et dispendia subire.

§ 2. E contrario Nobis quoque, dum etiam in minoribus essemus, superiorum judicum responsiones audire contigit asserentium, memoratas querelas inanes esse nec ulli innixas fundamento, utpote ex hac unica re causam et originem habentes, quod inferioribus grave est obedientiae ac subjectionis jugum erga majora tribunalia, ipsisque

nimis displicet sibi subditis appellationis beneficio succurri.

§ 3. Porro cum facile haec dissidia componi et succrescentia litium semina avelli possint; si quae a Sacra Tridentina Synodo, ab Apostolicis constitutionibus, et Congregationum decretis provide sancita sunt, debitae executioni mandentur: Nos idcirco ad conservandam Ecclesiae disciplinam restituendamque tribunalibus formam eisdem canonicis legibus consentaneam, pro credito Nobis Apostolicae servitutis Officio opportune duximus consulendum.

§ 4. Inhaerentes itaque decretis ejusdem Sacri Concilii, necnon Congregationis Episcoporum, et Regularium, jussu et approbatione rec. mem. Clementis PP. VIII. praedecessoris Nostri alias editis die 16 Octobris 1600;[1] itemque aliis Congregationis particularis, jussu pariter et approbatione fel. rec. Urbani PP. VIII. similiter praedecessoris Nostri promulgatis die 5 Septembris 1626[2] eorumque declarationibus nuper superadditis a piae mem. Benedicto XIII. etiam praedecessore Nostro in appendice Concilii Romani,[3] aliisque Apostolicis constitutionibus hac de re alias editis et innovatis, et praesertim constitutioni piae mem. Gregorii XV., quae incipit: *Inscrutabili*,[4] sub datum Romae apud Sanctum Petrum anno Incarnationis Dominicae 1622 nonis Februarii:

§ 5. Districte praecipimus et mandamus, ne deinceps ab executione decretorum dicti S. Concilii Tridentini, in omnibus illis causis et negotiis, in quibus executio hujusmodi Episcopis et locorum Ordinariis, etiam uti Sedis Apostolicae Delegatis, ab eodem Sacro Concilio vel dictis Apostolicis Constitutionibus appellatione vel inhibitione quacumque postposita commissa est, appellatio aliqua in tribunalibus praedictis recipiatur, vel inhibitiones, citationes generales vel speciales, cum commissione inserta, monitoria et alia hujusmodi, per quae dictorum Decretorum executio

[1] In *Collect. Lac. CC. Rec.* 1. 427. [2] Ibid. p. 438. [3] Ibid. p. 529.
[4] Apud *Richter et Schulte*, Conc. Trid. p. 539.

retardetur aut Processus ad ulteriora in eadem executione suspendatur aut impediatur, quoquo modo concedantur.

§ 6. Itaque a quibuscumque mandatis, prohibitionibus, provisionibus et statutis tam in visitatione quam extra, pro divino cultu conservando et augendo et praesertim circa ea quae observanda et evitanda sunt in celebratione Missae, aut alio quovis modo respiciunt executionem decreti S. Concilii *sess.* 21. *de Ref.* c. 8, *et sess.* 22. *in decret. de observ. et evit. in celebrat. Missae.*

§ 7. Item a decretis cogentibus clericos tam saeculares, quam regulares, etiam monachos, et exemptos, ad publicas processiones, servata tamen forma constitutionis san. mem. Pii V., quae incipit: *Etsi Mendicantium :* prout etiam a decretis et provisionibus super praecedentia inter personas ecclesiasticas tam saeculares quam regulares in eisdem processionibus, vel assotiatione defunctorum, delatione umbellae, et hujusmodi : necnon super observatione censurarum, etiam episcopalium, et festorum dioecesis, juxta dispositionem ejusdem Sacri Concilii *sess.* 25. *de Regular.* cc. 12, 13.

§ 8. Item in omnibus iis quae ad curam animarum et Sacramentorum administrationem quoquo modo pertinent, et praesertim adversus monitiones, censuras aut alias provisiones, per quas parochi aut alii curam animarum exercentes diebus saltem dominicis et festis solemnibus plebes sibi commissas salutaribus verbis pascere compelluntur docendo ea quae ad salutem necessaria sunt, iuxta decretum Sacri Concilii *sess.* 5. *de Ref.* c. 2.

§ 9. Item adversus deputationem vicariorum etiam perpetuorum cum assignatione congruae, per quos cura animarum exerceatur, quoties plura beneficia curata ex dispensatione apostolica ab aliquo obtineantur; vel quoties eadem beneficia curata cathedralibus, collegiatis, seu aliis ecclesiis, vel monasteriis, beneficiis, seu collegiis, aut piis locis quibuscumque perpetuo unita et annexa reperiuntur; juxta praescriptum dicti Sacri Concilii *sess.* 7. *de Ref.* cc. 5, 7, et juxta constitutionem san. mem. Pii V. quae incipit : *Ad exequendum.*

§ 10. Item adversus visitationem beneficiorum curatorum ut supra perpetuo unitorum, necnon quarumcumque ecclesiarum quomodolibet exemptarum, prout etiam adversus decreta et provisiones ab Ordinario capiendas, ut quae in eis reparatione indigent reparentur, et cura animarum, si qua illis imminet, aliisque debitis obsequiis minime defraudentur, juxta dispositionem Sacri Concilii eadem *sess.* 7 *de Ref.* c. 8, *et sess.* 21. c. 7.

§ 11. Item a decretis seu mandatis per quae Episcopi, etiam uti Apostolicae Sedis Delegati, in ecclesiis parochialibus, aut baptismalibus, in quibus populus ita numerosus est ut unus rector non possit sufficere ecclesiasticis sacramentis ministrandis et cultui divino peragendo, cogant rectores, vel alios ad quos pertinet, sibi tot sacerdotes ad hoc munus adjungere quot sufficiant ad sacramenta exhibenda, et cultum divinum celebrandum: aut etiam invitis rectoribus procedant ad constitutionem novarum parochiarum cum assignatione competentis portionis, ubi ob locorum distantiam sive difficultatem parochiani sine magno incommodo ad percipienda sacramenta et divina officia audienda accedere non possunt, vel denique propter paupertatem et in caeteris casibus a jure permissis deveniant ad uniones perpetuas aliorum beneficiorum simplicium, non tamen regularium, iuxta dispositionem Sacri Concilii *sess.* 21. *de Ref.* cc. 4, 5, *et sess.* 24 *similiter de Ref.* c. 13.

§ 12. Item a deputatione coadjutoruma ut vicariorum pro tempore, vel aliis provisionibus ab Episcopo capiendis, etiam tamquam Apostolicae Sedis Delegato, quando illiterati et imperiti parochialium ecclesiarum rectores sacris minus apti sunt officiis, cum assignatione partis fructuum pro sufficienti illorum victu: necnon a suspensione atque etiam a privatione illorum qui turpiter et scandalose vivunt et postquam praemoniti sunt in sua nequitia incorrigibiles perseverant, iuxta praescriptum ejusdem Concilii *d. sess.* 21. *de Ref. c.* 6.

§ 13. Item a translatione beneficiorum simplicium, etiam jurispatronatus, ex ecclesiis quae vetustate vel alias collap-

sae sint et ob eorum inopiam nequeant instaurari, vocatis iis quorum interest, in matrices aut alias ecclesias, cum omnibus emolumentis et oneribus: prout etiam a decretis cogentibus patronos, rectores, beneficiatos, aut parochianos sive populum, ad refectionem et instaurationem ecclesiarum parochialium servata forma Sacri Concilii *d. sess.* 21. *c.* 7.

§ 14. Item a censuris, sequestratione et subtractione fructuum, aut aliis quibuscumque provisionibus, pro cogendis ad residentiam parochis caeterisque omnibus quibus cura animarum incumbit, juxta decretum ejusdem Sacri Concilii *sess.* 23. *de Ref. c.* 1.

§ 15. Item a denegatione, revocatione, suspensione, vel restrictione et limitatione facultatis audiendi confessiones, respectu eorum qui parochiale beneficium non obtinent, etiam si fuerint regulares, pro excipiendis confessionibus saecularium, juxta ordinationem Sacri Concilii *sess.* 23. *c.* 15, et Praedecessorum Nostrorum constitutiones, ac praecipue illam fel. rec. Clementis X., quae incipit: *Superna.*

§ 16. Item in illis civitatibus aut locis, ubi vel parochiales ecclesiae certos non habent fines nec earum rectores proprium populum quem regant, sed promiscue petentibus Sacramenta administrant, vel etiam nullae sunt parochiales, a divisione seu distinctione parochiarum earumque ordinatione sive institutione in titulum perpetuum, iuxta decretum Sacri Concilii *sess.* 24. *de Ref. c.* 13.

§ 17. Item a deputatione vicarii vel oeconomi cum assignatione congruae pro tempore quo vacat ecclesia parochialis: prout etiam ab indictione concursus, relatione examinatorum, necnon praeelectione et provisione Episcopi in eodem concursu iuxta definitionem Sacri Concilii *eadem sess.* 24. *de Ref. c.* 18.

§ 18. Item a mandatis seu decretis inhibentibus praedicationem vel publicas lectiones, aut coercentibus vel punientibus quoscumque, etiam exemptos tam saeculares quam regulares, qui in alienis ecclesiis quae suorum Ordinum non sunt absque Episcopi licentia, et in ecclesiis suis aut suorum Ordinum non petita illius benedictione aut

ipso contradicente praedicare praesumpserint; iuxta decretum Sacri Concilii *sess.* 5. *de Ref. c.* 2., *et sess.* 24. *similiter de Ref. c.* 4., et constitutionem piae mem. Gregorii XV., quae incipit: *Inscrutabili*, § *fin.*, una cum declarationibus contentis in constit. Clementis PP. X., quae incipit: *Superna.*

§ 19. Et generaliter in omnibus iis quae pertinent ad curam animarum et rectam Sacramentorum administrationem, adversus visitationem, correctionem, coercitionem et quascumque alias provisiones Episcopi dioecesani, etiam quoad exemptos sive saeculares sive regulares, juxta laudatam constitutionem Gregorii XV., quae incipit: *Inscrutabili.*

§ 20. Item adversus quascumque provisiones et decreta pro conservanda aut restituenda clausura sanctimonialium, aut pro correctione seu punitione eorum, qui circa personas intra monasteria degentes aut circa clausuram vel circa bonorum administrationem deliquerint. Prout etiam ab examine pro approbatione vel reprobatione confessariorum sive regularium sive saecularium, quomodocumque exemptorum, et tam ordinariorum quam extraordinariorum, pro excipiendis confessionibus monialium etiam regularibus subjectarum. Itidemque a decretis vel aliis quibuscumque provisionibus cogentibus administratores sive saeculares sive regulares quomodolibet exemptos ad reddendam singulis annis rationem bonorum ad monasteria sanctimonialium hujusmodi pertinentium: ac demum a quibuscumque decretis super amotione capellanorum, sacristarum, et aliorum quorumcumque officialium et ministrorum, tam saecularium quam regularium, ipsis monialibus vel earum ecclesiis inservientium, juxta dispositionem Sacri Concilii *sess.* 25. *de Regular. et Monial. cc.* 5, 9, 10. servata tamen quoad regulares et exemptos forma praedictae constitutionis rec. mem. Gregorii XV., quae incipit: *Inscrutabili.*

§ 21. Item adversus pastoralem visitationem dioecesis, et praesertim monasteriorum, commendatorum, abbatiarum, prioratuum, et praeposiurarum, in quibus non viget

regularis observantia, necnon beneficiorum tam curatorum quam non curatorum saecularium et regularium qualitercumque commendatorum, etiam exemptorum: prout etiam ab executione eorum quae in ipsa visitatione mandata, decreta aut judicata fuerint. Necnon similiter a quibuscumque decretis, provisionibus, etiam extra visitationem, pro conservatione vel reparatione ecclesiasticae disciplinae, quoad vitam, mores et honestatem quorumcumque clericorum, luxum, commessationes, choreas, lusus, crimina et saecularia negotia fugienda atque evitanda; juxta plura decreta dicti Sacri Concilii, et praesertim *sess.* 6. *de Ref. c.* 4; *sess.* 13. *c.* 1; *sess.* 14. *c.* 4; *sess.* 21. *cc.* 8; *sess.* 22. *cc.* 1, 8; *et sess.* 24. *c.* 10. ad formam tamen decretorum S. C. Episcoporum de mandato san. mem. Clementis VIII. editorum anno 1600.

§ 22. Item a decretis cogentibus praesentatos, electos, vel nominatos a quibusvis ecclesiasticis personis, etiam nostris et Sedis Apostolicae nuntiis, ad quaevis ecclesiastica beneficia, ad se subjiciendum examini Ordinarii, antequam instistuantur, confirmentur vel admittantur, quemadmodum cavetur *sess.* 7. *de Ref. c.* 13.

§ 23. Item a denegatione sacrorum ordinum vel adscensus ad alios majores; prout etiam adversus suspensionem ab ordinibus jam susceptis ob crimen occultum, sive ex informata conscientia, juxta dispositionem Sacri Concilii *sess.* 14. *de Ref. cc.* 1., 3.; *et sess.* 21. *c.* 1.; *et sess.* 23. *c.* 16.

§ 24. Item a praefixione termini intra quem regularis Episcopo non subditus, qui intra claustra monasterii degat et extra ea ita notorie deliquerit ut populo scandalo sit a suo Superiore puniri debeat, ac de punitione ipse Episcopus certior fieri, iuxta decretum Sacri Concilii *sess.* 25. *de Regular. c.* 14., et Const. fel. recor. Clementis PP. VIII., quae incipit: *Suscepti muneris;* necnon adversus punitionem et correctionem eorumdem regularium, qui circa personas intra septa degentas aut circa clausuram ipsam deliquerint; juxta praedictam constitutionem Gregorii XV. quae incipit: *Inscrutabili.*

§ 25. Item a censuris aut aliis provisionibus contra concubinarios, et praesertim clericos etiam retinentes domi aut extra mulieres suspectas, juxta praescriptum Sacri Concilii *sess.* 24. *de Ref. Matrim. c.* 8.; *et sess.* 26. *de Ref. c.* 14.

§ 26. Item adversus privationem privilegii fori, et alias provisiones contra clericos non incendentes in habitu et tonsura, et in aliis casibus a Sacro Concilio praescriptis *sess.* 14. *de Ref. c.* 6.; *et sess.* 23. *similiter c.* 6.

§ 27. Prout etiam ab examine, approbatione, vel reprobatione patrimonii sacri, pensionis ecclesiasticae, aut beneficii, quoad clericos promovendos ad sacros ordines; juxta dispositionem ejusdem Concilii *sess.* 21. *de Ref. c.* 2.

§ 28. Item adversus convocationem Capituli, quam faciat Episcopus ad aliquid deliberandum et juxta vota ipsorum capitularium concludendum, quoties de re ad suum vel suorum commodum spectante non agatur, juxta decretum Sacri Concilii *sess.* 25. *de Ref. c.* 6.

§ 29. Item a mandatis seu decretis super conversione tertiae partis fructuum et quorumcumque proventuum et obventionum, tam dignitatum quam canonicatuum, personatuum, portionum, et officiorum in distributiones quotidianas, earumque divisiones inter dignitates obtinentes et caeteros divinis interessentes in ecclesiis tam cathedralibus quam collegiatis in quibus nullae sunt distributiones hujusmodi quotidianae, vel ita tenues ut verisimiliter negligantur; juxta constitutionem ejusdem Concilii *sess.* 21. *de Ref. c.* 3., *et sess.* 22. *similiter de Ref. c.* 3

§ 30. Item adversus exercitium facultatum Episcopis competentium super executione omnium piarum dispositionum, tam in ultima voluntate quam inter vivos, in casibus a Jure concessis, juxta dispositionem Sacri Concilii *sess.* 22. *de Ref. c.* 8.

§ 31. Item a visitatione hospitalium, collegiorum quorumcumque, et confraternitatum laicorum, eleemosynarum, montium pietatis sive charitatis, et omnium piorum locorum quomodocumque nuncupatorum, etiamsi eorum cura ad laicos pertineat aut exemptionis privilegio sint munita: ac

denique a cognitione et executione eorum omnium, quae ad Dei cultum aut animarum salutem, seu pauperes sustentandos instituta sunt, iuxta dictum decretum Sacri Concilii *sess.* 22. *de Ref. c.* 8.

§ 32. Item a decretis seu mandatis cogentibus administratores tam ecclesiasticos quam laicos, etiam exemptos, fabricae cujusvis ecclesiae etiam cathedralis, hospitalis, confraternitatis, eleemosynae, montis pietatis, et quorumcumque piorum locorum, ad reddendam singulis annis ipsi Ordinario rationem suae administrationis, nisi aliud in institutione et ordinatione talis ecclesiae seu fabricae expresse cautum fuerit; iuxta decreta Sacri Concilii *sess.* 7 *de Ref. c.* 15.; *sess.* 22. *c.* 9., *et sess.* 25. *c.* 8.

§ 33. Item a decretis compellentibus notarios etiam Apostolica, Imperiali aut Regia auctoritate creatos, et scribentes in causis ecclesiasticis vel spiritualibus, ad se subiiciendum examini, eorumque remotione vel suspensione in casu delicti vel imperitiae; juxta praescriptum Sacri Concilii *dicta sess.* 22. *c.* 10.

§ 34. Item ab erectione seminarii, et taxatione quarumcumque dignitatum, personatuum, officiorum, praebendarum, portionum, abbatiarum, et prioratuum cujuscumque Ordinis, etiam regularis, hospitalium, quae dantur in titusum vel administrationem, et beneficiorum quorumcumque, etiam regularium, etiam jurispatronatus, etiam exemptorum, etiam nullius dioecesis, vel aliis ecclesiis, monasteriis, hospitalibus, et aliis quibusvis locis piis, etiam exemptis annexorum, ac quorumcumque aliorum ecclesiasticorum redituum seu proventuum ad fabricas ecclesiarum, confraternitates et monasteria omnia, non tamen mendicantium, pertinentium, necnon decimarum quacumque ratione ad laicos atque etiam milites cujuscumque militiae aut ordinis, Hierosolymitano excepto, spectantium, pro ejusdem seminarii manutentione: prout etiam ab unione et applicatione aliquot beneficiorum simplicium; necnon a decretis cogentibus eos, qui scholasterias obtinent, vel quibus lectionis vel doctrinae munus est annexum ad docendum per se ipsos vel idoneos substitutos;

et generaliter a mandatis et provisionibus quae quoquo modo respiciunt curam, directionem et administrationem seminarii, plenamque executionem decreti editi a Sacro Concilio super collegio puerorum in singulis cathedralibus instituendo, *sess.* 12. *de Ref. c.* 18.

§ 35. Item a mandatis, seu decretis cogentibus oeconomos, vicarios capitulares, ad reddendam rationem administrationis per eos gestae sede episcopali vacante, juxta praescriptum Sacri Concilii *sess.* 24. *de Ref. c.* 16.

§ 36. Item a comminatione excommunicationis a Jure latae, et a sententia excommunicationis latae ab homine, suspensionis, et interdicti, nisi appellatio fuerit interposita ex capite nullitatis: et e converso a sententia absolutionis ab eisdem censuris ecclesiasticis.

§ 37. Et generaliter ab executione aliorum quorumcumque decretorum dicti Sacri Concilii Tridentini, Episcopis, atque Ordinariis locorum demandata ab ipso Concilio, et in constitutione fel. rec. Pii Papae IV., quae incipit: *Benedictus Deus.*

§ 38. Volumus, praecipimus et mandamus, quod ab Archiepiscopis, Patriarchis, seu Primatibus, aliisque judicibus ecclesiasticis, etiam Nostris et Sedis Apostolicae nuntiis, vel de latere Legatis, etiam Sanctae Romanae Ecclesiae Cardinalibus, atque etiam Camerae nostrae generali Auditore, Signaturae Justitiae Praefecto, caeterisque judicibus Romanae Curiae, eorumque vicariis, et officialibus, citationes generales vel speciales cum commissione inserta, monitoria, et alia hujusmodi cum inhibitione, per quam executio decretorum, mandatorum et provisionum hujusmodi retardetur, suspendatur, aut impediatur minime concedantur, et quatenus nunc aut imposterum concessa fuerint nullatenus inhibeant atque ab Episcopis aliisque locorum Ordinariis impune sperni possint; quacumque consuetudine etiam immemorabili, vel quovis privilegio, aut stylo concedendi inhibitiones in causis praedictis, tametsi temporarias, penitus exclusis. Nos enim citationes, et monitoria aliter quam ut praefertur concessa vel impo-

sterum concedenda, nulla atque irrita declaramus et pro nullis atque irritis haberi volumus et mandamus: Decernentes, quod adversus decreta, mandata, et provisiones ejusmodi, quas vel quae ab Episcopis aliisque locorum Ordinariis fieri vel capi contigerit in causis et negotiis praedictis, vel simplex dumtaxat et extrajudicialis recursus per viam supplicis libelli ad Nos et Successores Nostros Romanos Pontifices, vel respective et juxta causarum naturam et qualitatem appellatio ad quos de jure, in solo devolutivo et sine retardatione vel praejudicio legitimae executionis, recipi et admitti possit.

§ 39. Quoniam vero in hisce ipsis negotiis et causis in quibus inhibitiones canonicam executionem impedientes aut suspendentes concedi non debent, dari possunt casus qui per ipsum Sacrum Concilium Tridentinum, vel juxta ejus mentem per Apostolicas constitutiones et Sacrarum Congregationum declarationes aut communem Doctorum sententiam, a praefata generali regula de non concedendis inhibitionibus eisque posthabendis excipiuntur, quique ut plurimum non aliter quam prudenti judicis arbitrio secundum particulares facti circumstantias aestimari possunt: hinc Nos, ne sub ejusmodi praetextu inhibitiones ut supra prohibitae vulgo et sine ullo delectu etiam in casibus non exceptis concedantur: Statuimus et mandamus, quod in dictis causis et negotiis superius expressis Metropolitani, Patriarchae, Primates aliique judices praedicti et praesertim Camerae nostrae generalis Auditor ejusque Locumtenentes, et Signaturae Justitiae Praefectus ejusque Auditor, ad quos in contingenti casu pro obtinenda inhibitione recursum haberi contigerit, etiamsi asseratur casum illum a Sacro Concilio, vel Apostolicis constitutionibus quacumque de causa exceptum esse: nihilominus literas citatorias vel monitorias cum inhibitione hujusmodi non concedant, nisi prius ex facti circumstantiis in supplici libello a parte recurrente clare ac dilucide exponendis et cum aliquo documento semiplene saltem verificandis, eisdem summarie apparuerit casum illum esse de exceptis et propterea Epis-

copo vel Ordinario loci inhibendum esse ne ad ulteriora procedat. Tunc enim et non alias, et postquam ipsi judices, quorum conscientiam hac in parte oneramus, super dicti supplici libello manu sua rescripserint quod inhibitio concedi potest, libellusque cum rescripto ejusmodi in actis productus fuerit diligenter ibidem custodiendus et asservandus, liceat eorum notariis sive actuariis literas citatorias cum dicta inhibitione expedire et parti recurrenti tradere, ita tamen ut in earum calce expresse adjiciatur sequens clausula: "Nos enim, attentis juribus et supplici libello Nobis praesentatis atque in actis exhibitis, sic, ut prefertur, inhibendum esse speciali rescripto mandavimus." Alias literae ejusmodi sine tali clausula nullam vim inhibendi habeant in casibus praedictis.

§ 40. Et nihilominus si notarii sine dicto speciali rescripto super supplici libello aut sine productione illius in actis aut sine praedicta clausula citationes ullas aut monitoria cum inhibitione sub quocumque praetextu seu colore expedire ac tradere praesumpserint, etiamsi illae aut illa a judice subscripta fuerint, poenam infamiae et perpetuae inhabilitatis ad officium notarii in causis ecclesiasticis exercendum, et quoad illos Camerae Nostrae generalis Auditoris, aut aliorum Romanae Curiae judicum superius expressorum etiam quinquaginta ducatorum auri de Camera, pro una medietate Camerae Nostrae Apostolicae et pro alia ipsi parti recurrenti et in causa interesse habenti, sin minus alicui ex locis piis, arbitrio Nostro Nostrorumque successorum destinando, applicandam ipso facto incurrant.

§ 41. Ad haec, similiter inhaerentes dispositioni ejusdem Sacri Concilii *sess.* 7. *de Ref.* c. 14., *et sess.* 14. c. 5., necnon etiam decreto piae mem. Benedicti XIII. hac in re promulgato inter ejus additiones ad decreta Urbani Papae VIII. in appendice ad Concilium Romanum, volumus et mandamus quod clerici saeculares aut regulares extra monasterium degentes quomodolibet exempti in civilibus causis mercedum et miserabilium personarum, etiamsi certum judicem a Sede Apostolica deputatum in partibus habeant:

in aliis vero, si ipsum judicem non habuerint, coram locorum Ordinariis tamquam ab ipsa Sede delegatis conveniri in prima instantia, et jure medio ad solvendum debitum cogi possint.

§ 42. Quo vero ad personas non exemptas, inhaerendo similiter dispositioni ejusdem Sacri Concilii *sess.* 13. *de Ref. c.* 1., *et sess.* 22. *c.* 7., *et sess.* 24. *c.* 20. necnon supradictis decretis generalibus Congregationis Episcoporum editis anno 1600 cum novissimis additionibus seu declarationibus piae mem. Benedicti XIII. in appendice Concilii Romani: Volumus, statuimus et mandamus quod causae omnes tam civiles quam criminales ad forum ecclesiasticum pertinentes, exceptis privilegiatis quae ex eodem Concilio vel alias juxta canonicas sanctiones apud Nos et Sedem Apostolicam tractari possunt aut debent, coram Ordinariis locorum dumtaxat in prima Instantia cognoscantur, neque a Metropolitanis, Patriarchis, aut Primatibus, aliisque judicibus ecclesiasticis, etiam Nostris et Sedis Apostolicae nuntiis vel de latere legatis, aut Camerae Nostrae generali Auditore, et caeteris quibuslibet Curiae Nostrae judicibus ad se avocari vel aliis committi possint, nisi per viam legitimae appellationis et in casibus ut supra non prohibitis ad ipsorum tribunalia deferantur.

§ 43. Appellationes autem non recipiantur neque inhibitiones vigore illarum concedantur, nisi prius constiterit quod nedum per ligitimam personam et intra legitima tempora vere appellatum fuerit; sed etiam quod appellatum fuerit a sententia definitiva vel habente vim definitivae, aut a gravamine quod per definitivam sententiam reparari non possit: idque per publica documenta quae realiter in actis exhibeantur; tunc enim et non antea, judici ad quem appellatum fuerit, in causa se intromittere, citationes et inhibitiones concedere liceat; dummodo tamen concedantur cum inscriptione tenoris sententiae aut decreti definitivi seu vim definitivae habentis, vel damnum per definitivam irreparabile inferentis; alias citationes, processus, et inde sequuta quaecumque sint ipso iure nulla atque impune sperni possint.

§ 44. Quod si appellans asserat, sententiae aut decreti exemplum authenticum culpa judicis a quo, vel notarii sive actuarii habere non posse, tum saltem copiam simplicem sententiae seu decreti in actis producere teneatur, ejusque tenori in literis inhibitorialibus inserto adjicienda erit, prout adjici volumus, et mandamus, in earum corpore expressa conditio: "Quatenus tamen tenor insertus vere et in substantialibus cum originali concordet eodemque originali praesentes literae sint in tempore posteriores, alioquin nullae et irritae censeantur": Et si secus factum fuerit, inhibitiones aliter concessas nullatenus afficiant, et notarii sive actuarii qui illas expediverint incidant in poenas superius expressas.

§ 45. Cum vero a gravamine quod per definitivam reparari nequit appellatam fuerit, si quidem res sit de carceratione jam secuta cum mandato verbali, non aliter expediri poterunt inhibitiones vigore appellationis quam constito prius de ipsa carceratione per depositionem saltem duorum testium. Interim tamen appellans in eodem quo reperitur carcere permanebit, donec aliter servatis servandis judicatum fuerit. Ubi vero agatur de censuris jam prolatis, vel de comminatione carcerationis, torturae, aut censurarum, observetur omnino dispositio dictorum decretorum Congregationis Episcoporum sub rec. mem. Clemente VIII., juxta additiones et declarationes piae mem. Benedicti XIII.

§ 46. Ulterius in praedictis causis in prima instantia pendentibus vel aliis superius expressis in quibus non admittitur appellatio in suspensivo, citationes quae expediri solent coram Cardinali Signaturae Justitiae Praefecto, vel ad effectum comparendi vel pro adeundo eamdem Signaturam, tametsi ab ejus Auditore subscriptas, vim inhibendi nullatenus sortiri posse volumus easque ad praedictos alios dumtaxat effectus, comparendi scilicet vel adeundi Signaturam, expeditas censeri, non autem ad retardandam executionem vel suspendendum processum ad ulteriora.

§ 47. Denique quoad causas privilegiatas quae ut praefertur in prima etiam instantia apud Nos et Sedem Apos-

tolicam tractari possunt, nihil ex antiquo mutandum esse volumus, sed monitoria in illis coram Camerae Nostrae generali Auditore vel ejus locumtenentibus, prout hactenus laudabiliter observatum est, expedienda esse, juxta praescriptum Apostolicarum constitutionum, et praesertim fel. rec. Pauli V. Praedecessoris Nostri in constitutione, quae incipit: *Universi*, necnon praedictarum additionum et declarationum Benedicti XIII., exceptis tamen monitoriis intimandis ultra montes, in quibus ad evitanda scandala et litigantium incommoda, volumus omnino renovari et observari stylum, qui olim in eo tribunali vigebat, id est, quod ad ejusmodi monitoriorum expeditionem non aliter procedatur quam oblato prius ipsi Auditori vel alteri ex ejus Locumtenentibus coram quo monitorium expediendum erit supplici libello universam facti speciem clare et dilucide continente, et praevio etiam ejusdem judicis rescripto quod monitorium expediri possit penes causae notarium vel actuarium diligenter custodiendo. Etsi aliter quam praefertur et absque dicto supplici libello ac speciali judicis rescripto dicta monitoria ultra montes intimanda expedita fuerint, notarius sive actuarius et substitutus qui illa expediverit ipso facto incidat in poenas superius expressas.

§ 48. Omnia et singula hactenus a Nobis disposita ad rectam judiciorum methodum restituendam eo impensius ab omnibus exacte custodiri et observari mandamus, quo clarius constat hac nostra constitutione non novas ferri sed antiquas instaurari leges provide sapienterque institutas et temporum injuria ac hominum fraude obsoletas, et novo Pontificiae auctoritatis praesidio communiri ordinem procedendi in causis jamdiu praescriptum superioribus et inferioribus tribunalibus a Sacra Tridentina Synodo, Congregationum decretis, et Praedecessorum Nostrorum Romanorum Pontificum constitutionibus, aliisque ordinationibus Apostolicis. Ideoque si ipsi judices, omni semoto ut par est, humanae cupiditatis affectu prae oculis solum habuerint quae tam maturo tamque saluberrimo sunt constituta et ordinata consilio, facile eorum quilibet agnoscet quae sui

et quae alieni ministerii partes esse debeant in admittendis ac respective rejiciendis causarum appellationibus et inhibitionibus: atque ita fiet, ut non solum unicuique in suo ordine debita jurisdictionis et auctoritatis praerogativa servetur, sed etiam ut exstinctis prorsus ac radicitus avulsis omnium contentionum et discordiarum seminibus mutuo charitatis vinculo tribunalia socientur, et inter illa recte agendi disciplina Christiano populo utilis et necessaria restituatur.

§ 49. Demum ut exemplo Nostro omnes praemissorum executioni caute et pro viribus incumbant, et ut praesertim notariis, tabellionibus et eorum actuariis et substitutis omnis contraveniendi ansa praecidatur, volumus et expresse mandamus processus et acta causarum in Nostra Romana Curia coram quovis judice pendentium ac inhibitiones, appellationes, monitoria aliasque citatoriales et inhibitoriales literas, quas ab iisdem notariis eorumque substitutis scientibus vel insciis judicibus vel alias quomodolibet in posterum expediri contigerit, sedulo recognosci et examinari per fide dignas personas a Nobis opportune deputandas, quae si deprehenderint easdem inhibitiones contra hujus constitutionis formam et ad subterfugienda Ordinariorum et Episcoporum judicia quaesito gravaminis colore fuisse perperam concessas et expeditas, in eosdem notarios et substitutos canonicis poenis aliisque a Nobis supra expressis severe pro modo culpae animadvertant.

§ 50. Decernentes has praesentes literas semper firmas, validas et efficaces existere et fore, suosque plenarios et integros effectus sortiri et obtinere, ac ab illis ad quos spectat et pro tempore quandocumque spectabit inviolabiter et inconcusse observari: sicque et non aliter in praemissis per quoscumque judices ordinarios et delegatos, etiam causarum Palatii Apostolici Auditores, ac Sanctae Romae Ecclesiae praefatae Cardinales, etiam de latere Legatos, et ejusdem Sedis Nuntios, aliosve quoslibet quacumque praeeminentia et potestate fungentes et functuros, sublata eis et eorum cuilibet quavis aliter judicandi et interpretandi

facultate et auctoritate, judicari et definiri debere, ac irritum et inane si secus super his a quoquam quavis auctoritate scienter vel ignoranter contigerit attentari.

§ 51. Non obstantibus praemissis, ac quatenus opus sit, Nostra et Cancellariae Apostolicae regula de jure quaesito non tollendo, aliisque constitutionibus et ordinationibus Apostolicis, necnon quibusvis etiam juramento, confirmatione Apostolica, vel quavis firmitate alia roboratis statutis et consuetudinibus ac usibus et stylis, etiam immemorabilibus, privilegiis quoque, indultis et Literis Apostolicis, praefatis aliisque quibuslibet judicibus, curiis, tribunalibus, et personis, etiam quantumvis sublimibus et specialissima mentione dignis, sub quibuscumque tenoribus et formis ac cum quibusvis etiam degoratoriarum derogatoriis aliisque efficacioribus, efficacissimis et insolitis clausulis irritantibusque decretis, etiam motu, scientia, et potestatis plenitudine paribus, ac consistorialiter, et alias quomodolibet in contrarium praemissorum concessis, editis, factis, ac pluries iteratis, et quantiscumque vicibus approbatis, confirmatis et innovatis: Quibus omnibus et singulis, etiam si pro illorum sufficienti derogatione de illis eorumque totis tenoribus specialis, specifica, expressa et individua ac de verbo ad verbum, non autem per clausulas generales idem importantes, mentio seu quaevis alia expressio habenda aut aliqua alia exquisita forma ad hoc servanda foret, tenores hujusmodi, ac si de verbo ad verbum nihil penitus omisso et forma in illis tradita observata exprimerentur et inserererentur, praesentibus pro plene et sufficietur expressis et insertis habentes, illis alias in suo robore permansuris, ad praemissorum effectum hac vice dumtaxat specialiter et expresse derogatum esse volumus, caeterisque contrariis quibuscumque.

§ 52. Ut autem eaedem praesentes literae ad omnium notitiam facilius deveniant, volumus illas seu earum exempla ad valvas ecclesiae Lateranensis et basilicae Principis Apostolorum necnon Cancellariae Apostolicae Curiaeque Generalis in Monte Citatorio, ac in Acie Campi Florae de

Urbe, ut moris est, affigi et publicari sicque publicatas et affixas omnes et singulos quos illae concernunt perinde arctare ac afficere, ac si unicuique eorum nominatim et personaliter intimatae fuissent: ipsarum autem literarum transumptis seu exemplis etiam impressis, manu tamen alicuius notarii publici subscriptis et sigillo personae in ecclesiastica dignitate constitutae munitis, eamdem prorsus fidem tam in judicio quam extra illud ubique locorum haberi, quae haberetur ipsis praesentibus, si forent exhibitae vel ostensae.

§ 53. Nulli ergo omnino hominum liceat hanc paginam Nostri decreti, constitutionis, declarationis, annullationis, admonitionis, et voluntatis infringere, vel ei ausu temerario contraire; si quis autem hoc attentare praesumpserit, indignationem Omnipotentis Dei ac Beatorum Petri et Pauli Apostolorum ejus se noverit incursurum.

Datum Romae apud Sanctam Mariam Majorem anno Incarnationis Dominicae millesimo septingentesimo quadragesimo secundo, tertio Kal. Aprilis. Pontificatus Nostri Anno II.

P. Card. Pro-Datarius.
P. Card. Passioneus.

Visa de Curia.
N. Antonellus.
J. B. Eugenius.

Registrata in Secretaria Brevium.
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